Supreme Court, U. S.
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79-1181

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-

LUIS HERNANDEZ,
Petitioner

v.

STATE OF FLORIDA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA, THIRD DISTRICT

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IN THE

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OCTOBER TERM, 1979

No. 79-

LUIS HERNANDEZ,
Petitioner

v.

STATE OF FLORIDA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA, THIRD DISTRICT

Luis Hernandez respectfully petitions for a writ of certiorari to review the judgment of the District Court of Appeal of Florida, Third District, in *Hernandez, et al* v. *Florida.*[1]

OPINIONS BELOW

The opinion of the District Court of Appeal of Florida, Third District, which is not reported, appears as Appendix ("App.") A hereto. The order of the Supreme Court of Florida denying certiorari (App. B) is not reported. No

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[1] Counsel for James Eaton Staples and Chic Eder, whose appeals were consolidated with petitioner's in the District Court of Appeal of Florida, Third District, has informed undersigned counsel that a separate petition for a writ of certiorari will be filed with this Court on behalf of Messrs. Staples and Eder.

opinion was rendered by the Circuit Court of the Eleventh Judicial Circuit of Florida; the judgment of that court is reprinted as Appendix C hereto.

JURISDICTION

The judgment of the District Court of Appeal of Florida, Third District, was entered on February 27, 1979, affirming petitioner's conviction dated October 6, 1977. On April 16, 1979, the District Court of Appeal denied a timely petition for rehearing, and on November 7, 1979, the Supreme Court of Florida denied a petition for a writ of certiorari. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Does the Fourth Amendment forbid the warrantless search and seizure of opaquely wrapped packages found inside a closed, unoccupied truck by police officers responding to information received from a complainant of unproven reliability?

2. Do the decisions of this Court in *United States* v. *Chadwick*, 433 U.S. 1 (1977), and *Arkansas* v. *Sanders*, 439 U.S. 891, 99 S.Ct. 2586 (1979), have retroactive application to an alleged offense committed prior to their rendition?

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const., Amend. IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const., Amend. XIV, Sec. 1:

> * * * nor shall any State deprive any person of life, liberty, or property, without due process of law * * *.

STATEMENT OF THE CASE

At approximately 9:05 p.m. on October 30, 1976, Officers Joseph Sheppard and Adrian Martin of the Miami, Florida, Police Department received a radio call to investigate activity near the north side of the Fifth Street Bridge over the Miami River. The officers proceeded to that location and, finding nothing suspicious, radioed their dispatcher for more information. The dispatcher directed them to the nearby address of Mr. Herbert Halliwell, who had informed police that several men were unloading large packages from a boat onto a truck. Mr. Halliwell, who was unknown to the officers, pointed out to Officers Sheppard and Martin an area across the river where he had observed the unloading of a boat.

The two officers drove to the location indicated by Mr. Halliwell, a stretch of private property generally used by lobster fishermen to moor and unload their boats. They parked their cruiser at the entrance to a fenced-in lot, blocking exit from the area. The two officers proceeded down a dirt road toward the river. As they approached the water, they came upon a truck parked with its front facing them and its back facing a boat moored in the river. When Officer Sheppard reached the front of the truck, he racked a shell into the chamber of his shotgun. At that point, both officers heard rustling movements in the bushes, but they saw no one until Officer Sheppard reached the rear of the truck and saw a man at the edge of the water, about six yards away. The man (later identified as Chic Eder) entered the river and swam away.

Although he had no search warrant and had neither seen nor smelled any contraband, Officer Sheppard then

opened the rear door of the closed truck. Officer Sheppard later testifed that after opening the rear door, he

> observed the truck approximately three-quarters full with large bales of an unknown substance. At that particular time, that was loaded or packaged in an opaque-type material and also bound by burlap or canvas. [R. 39.[2]]

With the truck door open, Officer Sheppard noticed an odor which smelled to him like hay, but not like marijuana. Nevertheless, he took out a pocketknife and cut one of the bales, revealing what he suspected to be marijuana. Officer Martin then boarded the boat and conducted a search which revealed two weapons and a bale similar to the bales in the truck.

Additional officers were summoned to the area. Eder was pulled from the river and placed under arrest. Petitioner and two other men were arrested by Officer John Speisman, who observed them in the water approximately one block from the location of the boat and the truck.

The State filed a criminal information against petitioner, charging him with Unlawful Possession of Cannabis. Citing a violation of his Fourth and Fourteenth Amendment rights, petitioner moved to suppress the evidence seized from the truck and the boat. The motion was denied by the trial court, after a hearing. App. D. Petitioner was subsequently tried by a jury, convicted, and sentenced to two years' incarceration, a $5,000 fine, and three years' probation.

Petitioner's timely motion for a new trial was denied, and his conviction was affirmed on appeal by the District Court of Appeal, Third District, which found that the trial court had not erred in denying petitioner's motion to suppress the evidence seized without a warrant. App. 3a. On November 7, 1979, the Florida Supreme Court denied certiorari, with one Justice dissenting from the denial. App. 4a.

[2] References are to the Transcript of Record on Appeal as certified to the District Court of Appeal, Third District.

REASONS FOR GRANTING THE WRIT

I. The Lower Courts are in Conflict Concerning the Scope of the Fourth Amendment Principles Enunciated in *United States* v. *Chadwick* and *Arkansas* v. *Sanders*.

In two opinions within the past three years, this Court has explored the constitutionality of warrantless searches of even those containers which have been lawfully seized by police. (The element of legal seizure, we would contend, is absent here.) In *United States* v. *Chadwick*, *supra*, decided on June 21, 1977, this Court held that the Fourth Amendment was violated by federal narcotics agents when they conducted a warrantless search of a 200-lb. footlocker which they had lawfully seized and which they had probable cause to believe contained contraband.[3] The decision rested on expectations of privacy and lack of exigency where the footlocker was under the control of the federal agents at the time of the search:

> No less than one who locks the doors of his home against intruders, one who safeguards his personal possessions in this manner is due the protection of the Fourth Amendment Warrant Clause. There being no exigency, it was unreasonable for the Government to conduct this search without the safeguards a judicial warrant provides. [433 U.S. at 11.]

Two Terms later, this Court undertook to resolve "some apparent misunderstanding as to the application of [*Chadwick*] to warrantless searches of luggage seized from automobiles."[4] *Arkansas* v. *Sanders*, *supra*, 99 S.Ct. at 2588.

[3] Large amounts of marijuana were found in the footlocker. 433 U.S. at 5.

[4] Although the footlocker in *Chadwick* was seized from the trunk of a car, the Government did not contend that an automobile search was involved in that case. *Id.*

In *Sanders*, police had probable cause to believe that a certain green suitcase contained marijuana. After watching the suitcase being loaded into the trunk of a taxi, police officers stopped the taxi, asked the driver to open the trunk, and immediately searched the unlocked suitcase. *Id.* at 2588. The State argued in this Court that the warrantless search was proper under the so-called "automobile exception" to the warrant requirement.[5]

A majority of the members of this Court disagreed, holding that "as a general rule there is no greater need for warrantless searches of luggage taken from automobiles than of luggage taken from other places." 99 S.Ct. at 2593. The majority opinion discussed the two reasons underlying the "automobile exception": the inherent mobility of automobiles and the diminished expectation of privacy deriving from the configuration, use, and regulation of automobiles. The majority recognized that while the suitcase might be as mobile as the automobile in which it rides, "the exigency of mobility must be assessed at the point immediately before the search—after the police have seized the object to be searched and have it securely within their control." *Id.* The opinion noted that exigencies justifying the warrantless search of a suitcase generally would depend on such factors as the probable contents of the luggage (a gun, for example) or the suspect's access to those contents. *Id.* at n.11.

With regard to the expectation of privacy, the Court stressed that the "very purpose of a suitcase is to serve as a repository for personal items" (*id.* at 2593); and it noted that a gun case or a kit of burglars tools would not support such an expectation of privacy. *Id.* at n.13. The Court also acknowledged that:

> There will be difficulties in determining which parcels taken from an automobile require a warrant for

[5] *See, e.g., Chambers* v. *Maroney*, 399 U.S. 42 (1970); *Carroll* v. *United States*, 267 U.S. 132 (1925).

> their search and which do not. Our decision in this case means only that a warrant generally is required before personal luggage can be searched and that the extent to which the Fourth Amendment applies to containers and other parcels depends not at all upon whether they are seized from an automobile. [*Id.* at 2594 n.13.]

There are sharp conflicts among the courts which have decided recent container cases. For example, the Second Circuit has held that cardboard cartons should not have been searched without a warrant, *United States* v. *Dien*, Nos. 79-1036, 79-1072, 79-1075 (2d Cir. Oct. 26, 1979), while the Eighth Circuit has upheld the legality of a warrantless search involving a department store box. *United States* v. *Neumann*, 585 F.2d 355 (8th Cir. 1978).

Both courts focused on the issue of expectation of privacy, with the Second Circuit concluding that:

> By placing the marihuana inside a plain cardboard box, sealing it with tape and placing it inside a van the windows of which had been painted over and in which plywood had been placed behind the drivers' seat, petitioners manifested an expectation that the contents would remain free from public examination. The fact that the agents detected the odor of marihuana emanating from the van did not alter this. [*United States* v. *Dien*, *supra*, slip op. at 5246.]

The Eighth Circuit, on the other hand, found "an insufficient expectation of privacy in an unsecured cardboard box sitting in plain view in the passenger compartment of an automobile." *United States* v. *Neumann*, *supra*, 585 F.2d at 360. If a court seeking guidance in deciding a cardboard box case[6] were tempted to dis-

[6] *See also United States* v. *Gaultney*, 581 F.2d 1137 (1978) (no expectation of privacy in taped-shut Scrabble box); *People* v. *Dalton*, 24 Cal.3d 850, 598 P.2d 467, 157 Cal.Rptr. 497 (1979) (*en banc*) (reasonable expectation of privacy in contents of locked metal boxes).

tinguish these cases on the basis of the relative security of the boxes, this Court's language in *Sanders*, decided after *United States* v. *Neumann*, would be instructive. Comparing a small, unlocked suitcase with the locked 200-pound footlocker in *Chadwick*, the *Sanders* majority concluded that the difference in size was not material, "nor did respondent's failure to lock his suitcase alter its fundamental character * * * *" 99 S.Ct. at 2592 n.9.

The conflicting opinions in cases involving canvas-type containers are similarly divergent. The Tenth Circuit followed *Sanders* in finding that a backpack, like a suitcase, is a repository for transporting personal items and concluding that the warrantless search of a backpack violated the Fourth Amendment. *United States* v. *Meier*, 602 F.2d 253 (1979). Two months later, the Supreme Court of Iowa upheld the warrantless search of a knapsack which, unlike a footlocker or suitcase, did not securely conceal articles from view unless latched. "Unless the strap was tight and the sides of the flap were pulled down, contents of the knapsack became visible by simply pushing the flap aside, as on this occasion." *State* v. *Schrier*, 283 N.W.2d 338, 346 (1979).

In contrast, the Fifth Circuit had held even before this Court's decision in *Sanders* that expectations of privacy in the contents of a white canvas duffle bag brought it within the protection of the *Chadwick* prohibition against warrantless searches of luggage. *United States* v. *Johnson*, 588 F.2d 147 (1979).

Adding to the confusion caused by conflicts among the courts is a measure of misunderstanding regarding the proper application of the *Chadwick/Sanders* principles. The Supreme Court of Minnesota, for example, interpreted this Court's "expectation of privacy" principle as justifying a warrantless search *without probable cause*. *State* v. *Tungland*, —— Minn. ——, 281 N.W.2d 646, 649 (1979). The Minnesota court held that the motion to suppress of a defendant charged with possession of marijuana was properly denied because the defendant, who had left his car unlocked on a private lot without permission, with the keys in the ignition and intoxicating liquor in open view, had no expectation of privacy in the passenger area of his car. Consequently, the court found that a police officer did not violate defendant's Fourth Amendment rights when the officer entered the car and looked inside a grocery bag in the back seat, despite a finding that:

> One cannot justify the intrusion into the car and the search of the grocery bag on the theory that before he entered the car [the officer] had probable cause to believe the bag contained marijuana because it is clear that [he] did not have this probable cause. [*Id.*]

The difficulties encountered by the lower courts in determining which containers may be searched without a warrant were frequent in the 30 months following the *Chadwick* decision. The opinion has been cited at least 250 times, an average of more than 8 cases per month.

Similarly, the *Sanders* case, which was decided only seven months ago, has already been discussed by courts in 28 different cases. The dissenters in *Sanders* predicted that "Still hanging in limbo, and probably soon to be litigated are the briefcase, the wallet, the package, the paper bag, and every other kind of container." *Id.* at 2595. Not every kind of container has yet been litigated, but the list includes briefcases,[7] backpacks,[8] knapsacks,[9] cardboard boxes,[10] metal and leather boxes,[11] tote

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[7] *See United States* v. *Presler*, No. 79-5043 (4th Cir. Nov. 29, 1979); *United States* v. *Gooch*, 603 F.2d 122 (10th Cir. 1979); *United States* v. *Schleis*, 582 F.2d 1166 (8th Cir. 1978) (*en banc*).

[8] *See United States* v. *Meier*, *supra*, 602 F.2d at 253.

[9] *See State* v. *Schrier*, *supra*, 283 N.W.2d at 346.

[10] *See United States* v. *Dien*, *supra*, slip op. at 5242; *United States* v. *Neumann*, *supra*, 585 F.2d at 360.

[11] *See People* v. *Dalton*, *supra*, 24 Cal.3d at 850, 598 P.2d at 467, 157 Cal. Rptr. at 497.

bags,[12] duffle bags,[13] grocery bags,[14] and bales.[15]

This Petition presents an appropriate opportunity for forging the next link in the *Chadwick/Sanders* chain, for several reasons. First, this case involves a type of container which is different from a suitcase. The question of whether enclosing material in a sealed non-luggage container is a sufficient demonstration of privacy interest is an open one. In deciding whether these bales are protected by the Fourth Amendment, this Court would provide sorely needed guidance to the lower courts.

Second, the testimony of the officer who cut open the bale in this case is that he did not know what was inside before using his pocketknife. Thus, the complicating factors of protruding contraband or a tell-tale smell are absent.[16] There is also ample evidence that the truck and its contents were under the control of the police at the time of the search. No exigency existed which would justify the failure to obtain a warrant.

Finally, if this Petition were granted, we would argue that there was no probable cause in this case. If this Court were to decide that no reasonable expectation of privacy existed, it would be presented with the important question—raised in *Tungland* but never clearly decided by this Court—whether probable cause is a necessary predicate to a warrantless search.

II. The Courts are Also in Conflict Regarding the Retroactive Application of *Chadwick* and *Sanders*.

An additional compelling reason for granting this Petition is that the warrantless search and seizure took place in 1976, and the case was pending trial when this

[12] *See People* v. *Minjares*, 24 Cal.3d 410, 591 P.2d 514, 153 Cal. Rptr. 224 (1979).

[13] *See United States* v. *Johnson*, *supra*, 588 F.2d at 147.

[14] *See State* v. *Tungland*, *supra*, —— Minn. at ——, 281 N.W.2d at 649 (1979).

[15] *See Webb* v. *Florida*, 373 So.2d 400 (Fla. Dist. Ct. App. 1979).

[16] *See State* v. *Schrier*, *supra*, 283 N.W.2d 346; *Webb* v. *Florida*, *supra*, 373 So.2d at 402.

Court's decision in *Chadwick* was announced. An important question raised by this case, therefore, is whether *Chadwick* and its progeny should be applied retroactively.

The lower courts are badly split on this question. The Eighth Circuit [17] and the Supreme Court of California [18] have held that *Chadwick* announced no new rule of law, rejecting contentions that the case should only be applied prospectively.

The Second,[19] Fifth,[20] Seventh,[21] and Ninth Circuits,[22] however, have declined to apply *Chadwick* retroactively, citing this Court's decision in *United States* v. *Peltier*, 422 U.S. 531 (1975). Apparently, the Florida courts agree. The courts are obviously in conflict on the question of whether *Chadwick* announced a new constitutional doctrine;[23] they are also confused regarding the weight to be given to this Court's remand of *Schleis* v. *United States*, 433 U.S. 905 (1977), for further consideration in light of *Chadwick*.

On remand, the Eighth Circuit, sitting *en banc*, held in *Schleis* that *Chadwick* did not represent a departure from

[17] *See United States* v. *Schleis*, *supra*, 582 F.2d at 1173-74.

[18] *See People* v. *Minjares*, *supra*, 24 Cal.3d at 421 n.6, 591 P.2d at 519 n.6, 153 Cal.Rptr. at 229 n.6.

[19] *See United States* v. *Reda*, 563 F.2d 510 (2d Cir. 1977), *cert. denied*, 435 U.S. 973 (1978).

[20] *See United States* v. *Montgomery*, 558 F.2d 311 (5th Cir. 1977).

[21] *United States* v. *Berry*, 571 F.2d 2 (7th Cir. 1978), *cert. denied*, 439 U.S. 840 (1979).

[22] *United States* v. *Stewart*, 595 F.2d 500 (9th Cir. 1979).

[23] Yet another wrinkle concerns the application of *Sanders* retroactively. In *United States* v. *Dien*, *supra*, the Second Circuit, which had refused to apply *Chadwick* retroactively, held that "*Sanders* merely gave further clarity to a doctrine that was in force *at least* since *Chadwick*. * * * This is clearly not an appropriate case for us to refuse retroactive application of a Supreme Court decision." Slip op. at 5248 (emphasis added).

this Court's long-standing approach to the Fourth Amendment. 582 F.2d at 1173. The opinion specifically recognized that the Second, Fifth and Seventh Circuits had held that *Chadwick* should only be applied prospectively but noted: "If the Supreme Court had not intended *Chadwick* to be applied retroactively, there would have been no reason for remanding the case to this Court." *Id.* at n.6.

Subsequently, the Second Circuit was asked to reconsider its holding in *Reda* that *Chadwick* is inapplicable to pre-*Chadwick* searches. The panel declined to overrule *Reda*, but it also declined to rely on it, noting that neither party in *Reda* had called the panel's attention to the remand of *Schleis*. The opinion also noted that the "bearing of the Supreme Court's remand of *Schleis* was likewise not discussed in *United States* v. *Montgomery*, 558 F.2d 311 (5th Cir. 1977), on which the *Reda* panel relied." *United States* v. *Ochs*, 595 F.2d 1247, 1255 (2d Cir.), *cert. denied*, 48 U.S.L.W. 3172 (U.S. Nov. 13, 1979).

The confusion and conflict among the lower courts regarding not only the retroactivity but also the scope and meaning of this Court's opinions in *Chadwick* and *Sanders* are serious. The issues involved in this case recur with unusual frequency in both state and federal courts, and only this Court can insure that unequal treatment of defendants does not continue to occur.

CONCLUSION

We respectfully urge the Court, for all of the reasons set forth above, to grant a writ of certiorari and to reverse the decision below.

Respectfully submitted,

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Appendices

APPENDIX A

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING PETITION
AND, IF FILED, DISPOSED OF.

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
THIRD DISTRICT

JANUARY TERM, A.D. 1979

Case Nos. 77-1682
77-2412

LUIS HERNANDEZ, JAMES EATON STAPLES,
and CHIC EDER,
Appellants,

vs.

THE STATE OF FLORIDA,
Appellee.

Opinion filed February 27, 1979.

Appeals from the Circuit Court for Dade County, Ira L. Dubitsky, Judge.

Michael Kennedy and Paul Costeleiro; Jack Attias; Hirschhorn & Freeman and Joel Hirschhorn, for appellants.

Jim Smith, Attorney General and James H. Greason, Assistant Attorney General, for appellee.

Before HAVERFIELD, C.J., and PEARSON and BARKDULL, JJ.

PER CURIAM.

These appeals have been consolidated for appellate disposition because they grow out of the same factual situation. Chic Eder and James Eaton Staples appeal a judgment finding them guilty of possession of over one hun-

dred pounds of marijuana, entered upon their plea of nolo contendere, reserving their right to appeal the trial court's order denying their motions to suppress evidence of the marijuana, which was found in a truck and over which they were alleged to have had knowledge and control. The defendant Luis Hernandez appeals a judgment finding him guilty of the same crime. Hernandez was tried before a jury and found guilty.

Each of the defendants has a point urging error upon the trial court's denial of defendants' motion to suppress. For the determination of this question, it is necessary briefly to present the facts as revealed by the record. These facts will be set out in the light most favorable to the order of the trial judge. See Ponder v. State, 323 So.2d 296 (Fla. 3d DCA 1975); and Rodriguez v. State, 189 So.2d 656 (Fla. 3d DCA 1966).

Two police officers received a radio dispatch that an unidentified caller saw several men unloading bales from a boat at night in the Miami River. When the officers saw nothing in the area, they radioed for more information and were given the location of the caller. They contacted the caller, who gave them no further information other than pointing to the general location of the activity he allegedly saw. The officers proceeded to the private property involved. It was an area where lobsters and fishing boats frequently unload. The officers parked their car so as to block ingress and egress to and from the lot. With firearms drawn, they entered the property, saw a truck and heard a rustling noise in the surrounding bushes. Defendant Eder was seen near a moored boat backing into the water. As the officer approached him, Eder began to swim away. The officer returned to the back of the truck, looked inside through the rear door and saw bales of an unidentified substance enclosed in opaque material. One officer observed what he believed to be marijuana on the loading platform of the truck and thereafter cut open one bale to find a substance he recognized as marijuana.

Another police officer later spotted three heads bobbing in the river, one of whom he identified as Hernandez. Hernandez was not wearing a shirt, but a shirt was found aboard the boat on which the marijuana was seized. The officers seized the marijuana in the truck and on the boat.

We hold that the evidence is sufficient to show a probable cause to search the area and the truck which contained the contraband. We further hold that there was adequate, legally-sufficient evidence to withstand defendant Hernandez's motion for judgment of acquittal in that the evidence viewed in the light most favorable to the State shows a prima facie case. See Everett v. State, 339 So.2d 704 (Fla. 3d DCA 1976).

Defendant Hernandez urges, in addition to his claim that the evidence was insufficient, that he should be granted a new trial because a state requested instruction given by the court tended to place the burden on him of disproving his own guilt. We have examined the instruction to which objection was made and hold that it was properly given. See Selph v. State, 22 Fla. 537 (1886); and U.S. v. Llamas, 280 F.2d 392 (2d Cir. 1960).

Having examined the contentions of each appellant in the light of this record and finding no error, the judgments and sentences are affirmed.

Affirmed.

A True Copy

ATTEST:

LOUIS J. SPALLONE
Clerk District Court of
Appeal, Third District

By: /s/ Evelyn A. Hillman
Deputy Clerk

APPENDIX B

SUPREME COURT OF FLORIDA

Wednesday, November 7, 1979

Case No. 56,664

District Court of Appeal, Third District

77-1682
77-2412

LUIS HERNANDEZ, ET AL.,
Petitioners,

vs.

STATE OF FLORIDA,
Respondent.

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Fla. R. App. P. 9.120, and it appearing to the Court that it is without jurisdiction, it is ordered that certorari is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d).

BOYD, OVERTON, SUNDBERG and ALDERMAN, JJ., Concur

ADKINS, ACTING C.J., Dissents

A True Copy
TEST:
Sid J. White
Clerk Supreme Court.

By: /s/ Tanya Carroll
Deputy Clerk

C
cc: √Hon. Louis J. Spallone, Clerk
Hon. Richard P. Brinker, Clerk
Hon. Ira L. Dubitsky, Judge

Joel Hirschhorn, Esquire
of Hirschhorn & Freeman
James H. Greason, Esquire

A True Copy
ATTEST:
LOUIS J. SPALLONE
Clerk District Court of
Appeal, Third District

By: /s/ Evelyn A. Hillman
Deputy Clerk

APPENDIX C

BENCH DOCKET

IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT OF FLORIDA,
IN AND FOR DADE COUNTY

Case No. 76-9380-A

[Filed Oct. 6, 1977—Richard P. Brinker, Clerk]

STATE OF FLORIDA

vs.

LUIS HERNANDEZ

CHARGE, UNLAWFUL POSSESSION OF CANNABIS

JUDGMENT

It appearing unto this Court that you LUIS HERNANDEZ have been regularly tried and convicted of unlawful possession of cannabis in an amount in excess of one hundred (100) pounds.

IT IS THEREFORE THE JUDGMENT of the law and it is hereby adjudged that you are and stand convicted of the offense as above set forth, and it is hereby certified that the fingerprints on the certificate attached hereto and made a part hereof are the fingerprints of the Defendant in this cause and were placed thereon by the Defendant in my presence in Open Court on the date therein certified.

IT IS FURTHER ORDERED that costs in this cause shall be taxed in accordance with the law.

DONE AND ORDERED in open Court at Miami, Dade County, Florida, this 6th day of October A.D. 1977.

/s/ Ira L. Dubitsky
IRA L. DUBITSKY
Judge

[Recorded Oct. 17, 1977—Richard P. Brinker, Clerk]

STATE OF FLORIDA)
) S.S.
COUNTY OF DADE)

[SEAL]

I HEREBY CERTIFY that this instrument is a true and correct copy as shown by files and records in my office. WITNESS MY HAND and official seal this Nov. 17, 1977.

RICHARD P. BRINKER
Clerk, Circuit Court

By /s/ Gloria [Illegible]
D.C.

APPENDIX D

IN THE CIRCUIT COURT OF THE
11TH JUDICIAL CIRCUIT,
IN AND FOR DADE COUNTY, FLORIDA

CRIMINAL DIVISION

Case No. 76-9380A (Dubitsky)

[Filed Oct. 7, 1977—Richard P. Brinker, Clerk]

STATE OF FLORIDA,
Plaintiff,

vs.

LUIS HERNANDEZ,
Defendant.

ORDER DENYING DEFENDANT, LUIS HERNANDEZ'S, MOTION TO SUPPRESS

THIS CAUSE having come on to be heard before me upon the Motion to Suppress filed herein by the Defendant, LUIS HERNANDEZ, and the Court having taken extensive testimony herein, having received certain exhibits into evidence on the Defendant's Motion to Suppress, having heard argument of counsel and being otherwise fully advised in the premises, it is thereupon

ORDERED and ADJUDGED that for the reasons set forth with more particularity in the record, including the various findings of fact that this Court made on June 1, 1977, Defendant's Motion to Suppress the 5,000 pounds of marijuana seized, without a search warrant, by the City of Miami Police Department on October 30, 1976, be and the same is hereby DENIED; in addition, and for

the reasons also stated in the record and the findings of fact entered by the Court on June 1, 1977, Defendant, LUIS HERNANDEZ'S, Amended Motion to Suppress and ore tenus Motion to Suppress the oral statements, confessions, and/or admissions made by him be and the same are hereby DENIED.

DONE and ORDERED at Miami, Dade County, Florida, this 6th day of October, 1977 nunc pro tunc June 1, 1977.

/s/ [Illegible]
Circuit Court Judge

Copies furnished to:

Joel Hirschhorn, Esq.
State Attorney's Office

Supreme Court, U. S.
FILED
APR 23 1980
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979

79-1181

LUIS HERNANDEZ, CHIC EDER
and JAMES EATON STAPLES,

Petitioners,

-vs-

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE DISTRICT COURT OF APPEAL OF
FLORIDA, THIRD DISTRICT

BRIEF OF RESPONDENT IN OPPOSITION AND APPENDIX

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OPINION BELOW

The opinion below is reported as Hernandez v. State, 369 So.2d 76 (Fla. 3d DCA 1979) cert. denied 378 So.2d 345 (Fla. 1979). The decisions of the District Court and the Supreme Court of Florida are set forth in the Appendix.

JURISDICTION

The jurisdictional requisites are set forth in the briefs of the petitioners.

QUESTIONS PRESENTED

I

WHETHER THE WARRANTLESS SEARCH OF A CLOSED, UNOCCUPIED TRUCK AND THE SEIZURE OF BALES OF MARIJUANA IN OPAQUE WRAPPING FOUND IN THE CARGO COMPARTMENT, BASED ON PROBABLE CAUSE AND IN EXIGENT CIRCUMSTANCES, VIOLATED THE FOURTH AMENDMENT?

II

WHETHER THE DECISIONS OF THIS COURT IN UNITED STATES v. CHAD-

WICK, 433 U.S. 1 (1977), AND ARKANSAS v. SANDERS, 439 U.S. 891, 99 S.Ct. 2586 (1979), HAVE RETROACTIVE APPLICATION TO AN OFFENSE COMMITTED PRIOR TO THEIR RENDITION?

STATEMENT OF THE CASE AND FACTS

The respondent accepts the statements of the case and the facts as set forth in the briefs of the petitioners and as supplemented by the opinion below.

ARGUMENT

I

THE WARRANTLESS SEARCH OF A CLOSED, UNOCCUPIED TRUCK AND THE SEIZURE OF BALES OF MARIJUANA IN OPAQUE WRAPPING FOUND IN THE CARGO COMPARTMENT, BASED ON PROBABLE CAUSE AND IN EXIGENT CIRCUMSTANCES, DID NOT VIOLATE THE FOURTH AMENDMENT.

As stated in Arkansas v. Sanders, 439 U.S. 891, 99 S.Ct. 2586, 2591, (1979),

> One of the curcumstances in which the Constitution does not require a search warrant is when the police stop an automobile

> on the street or highway because they have probable cause to believe it contains contraband or evidence of a crime. See United States v. Martinez-Fuerte, 428 U.S. 543, 561-562, 96 S.Ct. 3074, 3084-3085, 49 L.Ed.2d 1116 (1976); United States v. Ortiz, 422 U.S. 891, 896, 95 S.Ct. 2585, 2588, 45 L.Ed.2d 623 (1975); Texas v. White, 423 U.S. 67, 68, 96 S.Ct. 304, 305, 46 L.Ed.2d 209 (1975).

In the language of Chambers v. Maroney, 399 U.S. 42, (1970),

> automobiles and other conveyances may be searched without a warrant in circumstances that would not justify the search without a warrant of a house or an office, provided that there is probable cause to believe that the car contains articles that the officers are entitled to seize. 399 U.S. 48

The Court restated the holding of Carroll v. United States, 267 U.S. 132, (1925):

> On reason and authority the true rule is that if the search and seizure without a warrant are made upon probable cause, that is, upon a belief, reasonably arising out of circumstances known to the seizing officer, that an automobile or other vehicle contains that which by law is sub-

> ject to seizure and destruction, the search and seizure are valid. U.S. at 149.
>
> * * *
>
> The right to search and the validity of this seizure are not dependent on the right to arrest. U.S. at 158.

Although Carroll dealty specifically with the stop and search of a vehicle in transit, Chambers dispells any motion that the vehicle need be actually moving; the crucial factor is that the vehicle is movable. 599 U.S. 51. The Court also stated that

> For constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant.
>
> 399 U.S. 52.

In determining the belief of the officers in Carroll, the Court looked to "the facts and circumstances within their knowledge, and of which they had reasonably trust-

worthy information." 399 U.S. at 162. This definition as well as other provisions of the Carroll opinion is statutory law in Florida.

The evidence adduced at the suppression hearing in the case sub judice established that the police officers who made the search and seizure in question had probable cuase. The facts are as set forth in the opinion of the District Court of Appeal of Florida, Third District, in Hernandez v. State, 369 So.2d 76 (Fla. 3d DCA 1979) wherein the court upheld the trial court's finding of probable cause:

> [On October 30, 1976,] two police officers recieved a radio dispatch that an unidentified caller saw several men unloading bales from a boat at night in the Miami River. When the officers saw nothing in the area, they radioed for more information and were given the location of the caller. They contacted the caller, who gave them no further information other than pointing to the general location of the activity he allegedly saw. The officers proceeded to the private property

> involved. It was an area where lobsters and fishing boats frequently unload. The officers parked their cars so as to block ingress and egress to and from the lot. With firearms drawn, they entered the property, saw a truck and heard a rustling noise in the surrounding bushes. Defendant Eder was seen near a moored boat backing into the water. As the officer approached him, Eder began to swim away. The officer returned to the back of the truck, looked inside through the rear door and saw bales of an unidentified substance enclosed in opaque material. One officer observed what he believed to be marijuana on the loading platform of the truck and thereafter cut open one bale to find a substance he recognized as marijuana.
>
> Another police officer later spotted three heads bodding in the river, one of whom he identified as Hernandez. Hernandez was not wearing a shirt, but a shirt was found aboard the boat on which the marijuana was seized. The officers seized the marijuana in the truck and on the boat.

The "unidentified caller" referred to by the District Court was a Mr. Herbert Hallowell, a resident of the area in which he saw the suspicious activity. The

essential elements of the information he gave the officers was corroborated, and it was the corroborating evidence, the officers' own observations, which gave rise to probable cause. Cf. Aguilar v. Texas, 378 U.S. 108 (1964); Spinelli v. United States, 399 U.S. 410 (1969). Draper v. United States, 358 U.S. 307 (1959); United States v. Carneglia, 468 F.2d 1084 (2d Cir. 1972). The officers found a truck in that location matching the description, and parked for loading thus corroborating the information given. There was no indication that the truck was incapable of being moved. Both officers heard noises indicating the presence of a number of persons in the darkenss, again corroborating the information that several men were doing the loading. The truck could have been driven away through the chain-link fence around the area. There clearly was probable cause to believe that truck

contained contraband and that the truck was movable. The situation was thus distinguishable from the facts of Coolidge v. New Hampshire, 403 U.S. 443, (1971), where there was no suggestion that the car was being used for any illegal purpose, and since it was regularly parked in the driveway of the defendant's house, the opportunity for search was not fleeting.

Another factor which can contribute to probable cause is the extent of the officers' knowledge of "public facts and geographical positions." Carroll v. United States, 267 U.S. at 160. Just as the agents in Carroll knew that the Detroit area was one of the most active centers in the country for smuggling bootleg whiskey, the officers in the case sub judice had general knowledge prior to the search that that area was used for marijuana smuggling. One officer had specific knowledge of a seizure of bales of

marijuana loaded in a truck. Neither officer had before seen a truck or a truck with a boat in the area in question.

An alternative or additional justification for opening the cargo door of the truck in this case is the fact that a serious threat to the officers' safety was presented. Where circumstances provide probable cause to believe a serious threat to safety exists, a cursory safety check is permitted, United States v. Cravero, 545 F.2d 406 (5th Cir. 1977), cert. denied 97 S.Ct. 1123; McGuhan v. Wainwright, 526 F.2d 397 (5th Cir. 1976); United States v. Looney, 481 F.2d 31 (5th Cir. 1973) cert. denied 414 U.S. 1070. The officers heard what sounded like people running near the truck. Their police dispatch had indicated more than one person was involved. Petitioner Eder took flight upon being commanded to stop. The officers were

reasonable in their belief in light of all the circumstances that the truck was occupied by someone possibly possessing a weapon. One officer testified that he was concerned for his safety and that of his partner in opening the truck. Therefore, the search was justified on safety grounds alone at least to the extent of opening the cargo door of the truck.

In light of the circumstances, the officers acted properly in searching the truck and the boat. The lawfulness of their actions must be considered on the basis of what they saw and the information they possessed, as stated in Carroll, without the benefit of hindsight. United States v. Wysocki, 457 F.2d 1155 (5th Cir. 1972) cert. denied 409 U.S. 859, 93 S.Ct 145, 34 L.Ed.2d 105.

Moreover, any attempt by the petitioners to characterize the bales of marijuana as containers, like luggage, from which an

expectation of privacy might be inferred from their appearance, must fail. One officer observed what he believed to be marijuana on the loading platform of the truck and noted the smell of hay or dried grass before he slit open one bale to sample its contents. There was therefore probable cause to support the seizure of the bales prior to the slitting of the one bale, based on plain view. Moreover, the contents of the marijuana bales was reasonably inferrable from their outward appearance in those circumstances, even though wrapped in opaque material. Albo v. State, 379 So.2d 648 (Fla. 1980). As stated in Note 13 to this Court's opinion in Arkansas v. Sanders, supra:

> Not all containers and packages found by police during the course of a search will deserve the full protection of the Fourth Amendment. Thus, some containers (for example a kit of burglar stools or a gun case) by their very nature cannot support any reasonable ex-

pectation of privacy because their contents can be inferred from their outward appearance. Similarly, in some cases the contents of a package will be open to "plain view," thereby obviating the need for a warrant. See Harris v. United States, 390 U.S. 234, 236, 88 S.Ct. 992, 993, 19 L.Ed.2d 1067 (1968)(per curiam). There will be difficulties in determining which parcels taken from an automobile require a warrant for their search and which do not. Our decision in this case means only that a warrant generally is required before personal luggage can be searched and that the extent to which the Fourth Amendment applies to containers and other parcels depends not at all upon whether they are seized from an automobile.

ARGUMENT

II

THE DECISION OF THIS COURT IN UNITED STATES v. CHADWICK, 433 U.S. 1 (1977), AND ARKANSAS v. SANDERS, 439 U.S. 891, 99 S.Ct. 2568 (1979) DO NOT HAVE RETROSPECTIVE APPLICATION TO AN OFFENSE COMMITTED PRIOR TO THEIR RENDITION.

Based upon the standards set forth by this Court in United States v. Peltier, 422

U.S. 531 (1975), the holdings of United States v. Chadwick, 433 U.S. 1 (1977), and Arkansas v. Sanders, 439 U.S. 891, 99 S.Ct. 2586 (1979), may not be retroactively applied to the case at bar. At the time of the search and seizure in issue, October 30, 1976, neither Chadwick nor Sanders had been decided, and rule of law in Florida, the Fifth Circuit, and other circuits in effect at that time was that law enforcement officers could open containers found in motor vehicles so long as they had probable cause to believe the containers contained evidence or contraband, pursuant to the automobile exception to the warrant requirement under Carroll v. United States, 267 U.S. 132 (1925), and Chambers v. Maroney, 399 U.S. 42 (1970). United States v. Montgomery, 558 F.2d 311 (5th Cir. 1977); United States v. Gaultney, 581 F.2d 1137 (5th Cir. 1978); United States v. Redu, 563 F.2d 510 (2d Cir. 1977) cert. denied

435 U.S. 973 (1978); United States v. Barry, 571 F.2d 2 (7th Cir. 1978) cert. denied 439 U.S. 840 (1979); United States v. Stewart, 595 F.2d 500 (9th Cir. 1979); United States v. Ochs, 595 F.2d 1247 (2d Cir. 1979) cert. denied 48 N.S.L.W. 3172 (1979); United States v. Tramunti, 513 F.2d 1087 (2d Cir. 1975) cert. denied 423 U.S. 832 (1975). Therefore, at that time the police officers could have opened one of the bales of marijuana, which was wrapped in opaque material, found in the cargo compartment of the truck even if under Chadwick and Sanders the bales were now deemed a container, like a suitcase, which manifested a reasonable expectation of privacy.

CONCLUSION

For the foregoing reasons and authority, the petitions for Writ of Certiorari must be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Respondent in Opposition was furnished by mail to E. BARRETT PRETTYMAN, Esq., 815 Connecticut Avenue, N.W., Washington, D.C., 2006, and JOEL HIRSCHHORN, Esq., 742 N.W. 12th Avenue, Miami, Florida, 33136, this _____ day of April, 1980.

JAMES H. GREASON
Assistant Attorney General

A P P E N D I X

Luis HERNANDEZ, James Eaton Staples, and Chic Eder, Appellants,

v.

The STATE of Florida, Appellee.

Nos. 77-1682, 77-2412

District Court of Appeal of Florida, Third District.

Feb. 27, 1979.

Rehearing Denied April 16, 1979.

Defendants were convicted in the Circuit Court, Dade County, Ira L. Dubitsky, J., of possession of over 100 pounds of marijuana and they appealed. The District Court of Appeal held that: (1) the evidence was sufficient to show probable cause to search a truck and the area around it, and (2) the evidence was sufficient to sustain one defendant's conviction.

Affirmed.

Michael Kennedy and Paul Costeleiro, New York City, Jack Attias, Key Biscayne, Hirschhorn & Freeman and Joel Hirschhorn,

Miami, for appellants.

Jim Smith, Atty. Gen., and James H. Greason, Asst. Atty. Gen., for appellee.

Before HAVERFIELD, C.J., and PEARSON and BARKDULL, JJ.

PER CURIAM.

These appeals have been consolidated for appellate disposition because they grow out of the same factual situation. Chic Eder and James Eaton Staples appeal a judgment finding them guilty of possession of over one hundred pounds of marijuana, entered upon their plea of nolo contendere, reserving their right to appeal the trial court's order denying their motions to suppress evidence of the marijuana, which was found in a truck and over which they were alleged to have had knowledge and control. The defendant Luis Hernandez appeals a judgment finding him guilty of the same

crime. Hernandez was tried before a jury and found guilty.

Each of the defendants has a point urging error upon the trial court's denial of defendants' motion to suppress. For the determination of this question, it is necessary briefly to present the facts as revealed by the record. These facts will be set out in the light most favorable to the order of the trial judge. See Ponder v. State, 323 So.2d 296 (Fla. 3d DCA 1975); and Rodriguez v. State, 189 So.2d 656 (Fla. 3d DCA 1966).

Two police officers received a radio dispatch that an unidentified caller saw several men unloading bales from a boat at night in the Miami River. When the officers saw nothing in the area, they radioed for more information and were given the location of the caller. They contacted the caller, who gave them no

further information other than pointing to the general location of the activity he allegedly saw. The officers proceeded to the private property involved. It was an area where lobsters and fishing boats frequently unload. The officers parked their car so as to block ingress and egress to and from the lot. With firearms drawn they entered the property, saw a truck and heard a rustling noise in the surrounding bushes. Defendant Eder was seen near a moored boat backing into the water. As the officer approached him, Eder began to swim away. The officer returned to the back of the truck, looked inside through the rear door and saw bales of an unidentified substance enclosed in opaque material. One officer observed what he belived to be marijuana on the loading platform of the truck and thereafter cut open one bale to find a substance he recognized as marijuana.

Another police officer later spotted three heads bobbing in the river, one of whom he identified as Hernandez. Hernandez was not wearing a shirt, but a shirt was found aboard the boat on which the marijuana was seized. The officers seized the marijuana in the truck and on the boat.

We hold that the evidence is sufficient to show a probable cause to search the area and the truck which contained the contraband. We further hold that there was adequate, legally-sufficient evidence to withstand defendant Hernandez's motion for judgment of acquittal in that the evidence viewed in the light most favorable to the State shows a prima facie case. See Everett v. State, 339 So.2d 704 (Fla. 3d DCA 1976).

Defendant Hernandez urges, in addition to his claim that the evidence was insufficient, that he should be granted a new trial because a state requested instruc-

tion given by the court tended to place the burden on him of disproving his own guilt. We have examined the instruction to which objection was made and hold that it was properly given. See Selph v. State, 22 Fla. 537 (1886); and U.S. v. Llamas, 280 F.2d 392 (2d Cir. 1960).

Having examined the contentions of each appellant in the light of this record and finding no error, the judgments and sentences are affirmed.

Affirmed.

SUPREME COURT OF FLORIDA

WEDNESDAY, NOVEMBER 7, 1979

CASE NO. 56,664

District Court of Appeal,
Third District

77-1682
77-2412

LUIS HERNANDEZ, ET AL.,

Petitioners,

vs.

STATE OF FLORIDA,

Respondent.

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Fla.R.App.P. 9.120, and it appearing to the Court that it is without jurisdiction, it is ordered that certiorari is denied.

No Motion for Rehearing will be entertained by the Court. See Fla.R.App.P. 9.330(d).

BOYD, OVERTON, SUNDBERG and ALDERMAN, JJ., Concur.

ADKINS, ACTING C.J., Dissents
A True Copy
TEST:

Sid J. White
Clerk Supreme Court.
By: TANYA CARROLL, Deputy Clerk

Supreme Court, U.S.
FILED
MAY 5 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1181

LUIS HERNANDEZ,

Petitioner

v.

STATE OF FLORIDA,

Respondent

PETITIONER'S REPLY MEMORANDUM

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1181

LUIS HERNANDEZ,
Petitioner

v.

STATE OF FLORIDA,
Respondent

PETITIONER'S REPLY MEMORANDUM

The Brief of Respondent in Opposition ("Resp. Brief") makes several mistaken or misleading assertions to which a short reply is warranted. In addition, petitioner takes this opportunity to inform the Court of recent lower court opinions which illustrate the need for guidance to those courts and which support the granting of a writ of certiorari in this case.

1. This is not a "plain view" case.

Respondent asserts that because one officer observed "what he believed to be marijuana" and noted the smell of hay or dried grass, there was probable cause "to support the seizure of the bales prior to the slitting of the one bale, based on plain view." Resp. Brief at 11. This is

a distortion of both the facts[1] and the law. The officer testified that prior to opening the truck he did not see or smell any contraband (R. 67, 70) and that on opening the truck, what he saw was "large bales of an unknown substance * * * that was loaded or packaged in an opaque-type material and also bound by burlap or canvas." R. 39.[2]

---

[1] Respondent accepts the statements of facts set forth by petitioners, as supplemented by the opinion of the District Court of Appeal of Florida, Third District. Resp. Brief at 2, 5. While we believe that the facts in this case are not disputed, the statement of those facts in the lower court's opinion is abbreviated and subject to misinterpretation.

For example, a quick reading of the facts as quoted by respondent from the opinion of the lower court might lead one to believe that the officer saw unbaled marijuana in addition to seeing opaquely-wrapped bales. The evidence is otherwise. *See* n. 2, *infra*.

[2] On cross-examination, the officer testified as follows:

Q. So you are saying, at the edge of the door, you don't smell anything at that time; do you?

A. No.

Q. You don't know what is contained in the truck?

A. No.

Q. You can't see any contraband anywhere around, can you?

A. Not in plain view, no.

Q. And you don't have X-ray vision?

A. No.

Q. You don't see any contraband of any sort on the boat—

A. No, from where I am standing.

Q. (Continuing)—or on the grounds, at all, on the boat or truck?

A. No.

Q. You then opened the door?

A. That's correct.

Q. Upon opening the door, you observed several bales; is that correct?

[Footnote continued on page 3]

Opaquely-wrapped marijuana is not subject to "plain sight seizure," as respondent well knows, since the very same issue was litigated unsuccessfully by the State of Florida in a case decided by the Third District Court of Appeal of Florida less than one year ago. In *Pomerantz* v. *State*, 372 So.2d 104 (1979), the state argued that opening and seizing the contents of two black plastic bags was "a valid plain sight seizure of contraband which excused the necessity of obtaining a search warrant * * * ." *Id.* at 110. The court reviewed the applicable law and held that since "[i]t was necessary for the offi-

---

[2] [Continued]

A. I observed a large truck, approximately two-thirds full of large bales.

Q. Isn't it a fact that even at the point after you raised the door and looked in, and you saw the bales, even at that point, you didn't know what, if anything, those bales contained; did you?

MR. GILBERT: Objection.

THE COURT: Overruled.

THE WITNESS: I had an idea, a real good idea of what they contained.

BY MR. KENNEDY:

Q. But you didn't know, did you?

A. No, not for a fact.

Q. And, in your prior deposition, you were asked whether or not a smell emanated from the back of that truck; is that correct?

MR. GILBERT: Objection, form.

THE COURT: Sustained as to form.

BY MR. KENNEDY:

Q. Your first impression, upon opening the truck, was that there were bales of something such as alfalfa or hay; isn't that true?

A. That's what I stated in my deposition.

Q. And that is true; is it not?

A. It smelled like some type of dried grass or something like that. [R. 70-72.]

cers to conduct a search by slitting open the black plastic trashbags in order to discover the marijuana * * *, no valid plain sight seizure of contraband from the [open] suitcase was ever accomplished and the search and seizure conducted therein was unreasonable." *Id.*

Similarly, respondents place untoward reliance on the officer's detection of an odor of dried grass or hay. The officer's failure to identify the odor as that of marijuana argues against probable cause, but even if he had been certain of the smell, he would not have been entitled to open the containers without a warrant. Respondents have not attempted to distinguish *United States* v. *Dien*, cited in our Petition, in which the court held that "[b]y placing the marihuana inside a plain cardboard box, sealing it with tape and placing it inside a van the windows of which had been painted over and in which plywood had been placed behind the drivers' seat, petitioners manifested an expectation that the contents would remain free from public examination. The fact that the agents detected the odor of marihuana emanating from the van did not alter this." 609 F.2d 1038, 1045 (2d Cir. 1979), *rehearing denied*, Nos. 79-1036, 79-1072, 79-1075; Nos. 1080-2 (2d Cir. Jan. 31, 1980).

2. The lower courts continue to be in confusion concerning the issues presented by this case.

Federal and state courts across the country continue to demonstrate their need for guidance in interpreting this Court's decisions in *United States* v. *Chadwick*, 433 U.S. 1 (1977), and *Arkansas* v. *Sanders*, 442 U.S. 753 (1979).[3] Very recently, for example, the United States

[3] Among the issues which continue to be in conflict is whether *Chadwick* and *Sanders* should be applied retroactively. The Sixth Circuit and the Texas Court of Criminal Appeals have joined the Second, Fifth, Seventh and Ninth Circuits in declining retroactive application. *See United States* v. *Calandrella*, 605 F.2d 236 (6th Cir.), *cert. denied*, 100 S.Ct. 522 (1979); *Brown* v. *State*, 594 S.W.2d 86 (Tex. Crim. App. 1980); *Nastu* v. *State*, 589 S.W.2d 434 (Tex. Crim. App. 1979); *Kemner* v. *State*, 589 S.W.2d 403 (Tex. Crim. App. 1979); *United States* v. *Reda*, 563 F.2d 510 (2d Cir. 1977), *cert. denied*, 435 U.S. 973 (1978); *United States* v. *Montgomery*, 558 F.2d 311 (5th Cir. 1977); *United States* v. *Berry*, 571 F.2d 2 (7th Cir. 1978), *cert. denied*, 439 U.S. 840 (1979); *United States* v. *Gallop*, 606 F.2d 836 (9th Cir. 1979); *United States* v. *Cornejo*, 598 F.2d 554 (9th Cir. 1979); *United States* v. *Stewart*, 595 F.2d 500 (9th Cir. 1979).

The Eighth Circuit and the Supreme Court of California, however, have rejected contentions that *Chadwick* should only be applied prospectively. *See United States* v. *Schleis*, 582 F.2d 1166 (8th Cir. 1978) (*en banc*); *People* v. *Minjares*, 24 Cal.3d 410, 591 P.2d 514, 153 Cal. Rptr. 224, *cert. denied*, 100 S.Ct. 181 (1979). The Second Circuit, meanwhile, has reiterated its view that *Sanders* did not make new law. *See United States* v. *Dien*, *supra*, slip op. at 5943. *But see State* v. *Kahlon*, No. A-4707-78 (N.J. Super Ct. App. Div. Feb. 13, 1980).

[4] A copy of the opinion is reprinted as the Appendix ("App.") to this memorandum.

[5] The warrantless seizure of the bags was felt by the majority to be justified by the same circumstances which allowed the warrantless search of the automobile from which the items were seized. App. 8a.

Court of Appeals for the District of Columbia Circuit, in deciding a case involving the suppression of evidence seized from a paper bag and a leather pouch, prefaced its analysis with the observation that "[t]he [Supreme] Court left us without detailed guidance concerning just what nonluggage containers require a warrant before being searched." *United States* v. *Ross*, No. 79-1624, slip op. at 9 (D.D.C. Apr. 17, 1980).[4]

The majority and dissenting opinions in the *Ross* case illustrate clearly that either this Court did not provide sufficient guidance to the lower courts, or some judges are badly misreading the *Chadwick* and *Sanders* opinions. Writing for the majority in *Ross*, Judge Tamm focused on defendant's reasonable expectation of privacy—specifically, whether it was reasonable to expect that the bag and pouch would remain unopened after their seizure by the police.[5] App. 8a. In reaching the conclusion that

"the fourth amendment does not protect any privacy interest in a closed but unsealed paper bag over and above the privacy justified by virtue of possession and control" (App. 9a), the majority considered several factors. These included " 'customs and values of the past and present,' " as well as "the precautions taken to preserve privacy,[6] the manner in which the paper bag was used, and the property rights in the bag at the time of the search." App. 13a-14a.

The leather pouch, on the other hand, was simply labelled as luggage, without the sort of analysis applied to the paper bag. App. 17a. On the basis of *Sanders*, the majority ordered suppression of the evidence secured from the pouch. App. 18a.

Judge Bazelon dissented from that part of the majority opinion which upheld the search of the paper bag. App. 19a. Quoting from *Sanders*, he noted that "[t]he Supreme Court has said in the clearest of terms that 'the extent to which the Fourth Amendment applies to containers and other parcels depends *not at all* upon whether they are seized from an automobile.' " (App. 20a; emphasis supplied by Judge Bazelon). He reasoned that since none of the other recognized exceptions to the warrant requirement could be applied, the majority was attempting to define a new exception under which the burden would be on the defendant to demonstrate that his possessions should be entitled to Fourth Amendment protection. App. 20a-21a.

Judge Bazelon criticized the majority for having read *Sanders* and *Chadwick* "as creating a 'luggage rule' rather than as limiting the 'automobile exception.' " App. 25a. He interpreted this Court's guidance to be that "the containers or parcels that do *not* deserve the full protec-

[6] The majority conceded that if the defendant had sealed the paper bag shut, a search warrant would have been required. App. 16a, n.6.

tion of the Fourth Amendment are those that display their contents by their nature." App. 28a.

Among the other courts which have recently rendered opinions involving warrantless searches of non-suitcase containers, some have applied the "expectation of privacy" rationale advocated by the *Ross* majority,[7] while others have taken the approach advocated by Judge Bazelon[8] in forbidding searches of containers which neither display their contents nor fit within one of the recognized exceptions to the warrant requirement. In addition, there have been cases in which the court's reasoning combined elements of both above-mentioned theories.[9]

The United States District Court for the Northern District of Texas, to give another example, discussed the relevant standards at length in granting a motion to suppress evidence (marijuana) obtained from opaque

[7] *See, e.g., Clark* v. *State*, 574 P.2d 1261 (Alas. 1978) (expectation of privacy in locked luggage "incomparably higher" than in paper bag); *Wyss* v. *State*, 262 Ark. 502, 558 S.W.2d 141 (1977) (toolbox not a repository of personal effects); *Ulesky* v. *State*, 379 So.2d 121 (Fla. Dist. Ct. App. 1979) (higher expectation of privacy in purse than in automobile); *Flynn* v. *State*, 374 So.2d 1041 (Fla. Dist. Ct. App. 1979) (no expectation of privacy for black plastic garbage bag); *State* v. *Marcum*, 24 Wash. App. 975, 601 P.2d 975 (1979) (reasonable expectation that athletic bag would be free from police intrusion).

[8] *See, e.g., Pomerantz* v. *State, supra*, 372 So.2d at 110 (unreasonable to slit open black plastic trashbags since no contraband in plain sight); *People* v. *Bayles*, 76 Ill.App. 3d 843, 395 N.E.2d 663 (1979) (contents of cloth whiskey bag not inferred from outward appearance); *Pirner* v. *State*, —— Md. App. ——, 411 A.2d 135 (Ct. Spec. App. 1980) (search of duffle bag unlawful in absence of special circumstances); *State* v. *DeLong*, 43 Or.App. 183, 602 P.2d 665 (1979) (where no other warrant exception applies, police may seize from auto closed container, such as camera case, with probable cause, but may search it only with warrant).

[9] We make no attempt here to list all of the recently reported cases interpreting *Chadwick* and *Sanders*. To illustrate the proliferation of such cases, we note that in January 1980 LEXIS listed 18 federal cases and 10 state cases citing *Sanders*. By the end of April 1980—three months later—there were 33 federal and 58 state cases listed.

polyethylene bags which were seized from several vehicles. *United States* v. *Rivera*, Crim. No. 3-79-190 (N.D. Tex. Jan. 11, 1980).[10] The court inquired "whether there is a reasonable expectation measured by society's expectation of government that sealed polyethylene bags with 'suspicious' contents may be opened without a warrant," but concluded that "[o]ne man's garbage bag is another man's luggage." *Id.* Recognizing that law enforcement officers are "most often given no guidance by these cases," the court suggested "an easily understood and administered standard—if the contents of a sealed package or parcel are not revealed by the package and you have exclusive control with no fear of harm from its contents—obtain a warrant." *Id.*

CONCLUSION

For the foregoing reasons, and for the reasons stated in his earlier Petition, petitioner respectfully urges the Court to grant a writ of certiorari and to reverse the decision below.

Respectfully submitted,

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[10] Undersigned counsel have been advised that the United States is appealing to the Fifth Circuit Court of Appeals the District Court's order granting the motion to suppress in the *Rivera* case.

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 79-1624

UNITED STATES OF AMERICA

v.

ALBERT ROSS, JR., APPELLANT

Appeal from the United States District Court
for the District of Columbia

(D.C. Criminal No. 78-698)

Argued December 7, 1979

Decided April 17, 1980

William J. Garber (appointed by this court) for appellant.

Bobara E. Liles, Assistant United States Attorney, with whom *Carl S. Rauh*, United States Attorney, *John A. Terry* and *Peter E. George*, Assistant United States Attorneys, were on the brief, for appellee.

Before BAZELON, *Senior Circuit Judge*, TAMM, *Circuit Judge*, and HAROLD H. GREENE,* *United States District Judge for the District of Columbia.*

Opinion for the court filed by *Circuit Judge* TAMM.

Opinion concurring in part and dissenting in part filed by *Senior Circuit Judge* BAZELON.

TAMM, *Circuit Judge*: With this case we must decide whether law enforcement officers must obtain a search warrant before opening a closed paper bag or a closed leather pouch lawfully seized from the trunk of an automobile that the officers have probable cause to believe contains narcotics. We conclude that under the circumstances of this case, the defendant did not have a reasonable expectation of privacy in the contents of the paper bag once the bag was in police hands; the warrantless search of the paper bag, therefore, was permissible. A pouch, however, is a form of luggage and the police must have a warrant to search such an item. Because the conviction of the defendant in this case rested on evidence obtained from both containers, we must reverse that conviction and remand for a new trial at which items taken from the paper bag, but not from the leather pouch, may be admitted.

I

On November 27, 1978, Detective Charles Marcum of the Metropolitan Police Department in Washington, D.C., received a telephone call from an informant who on prior occasions had provided reliable information about trafficking in narcotics that had led to seizures and arrests. The informant told Marcum that he had observed a man known as "Bandit" selling narcotics in front of 439 Ridge Street, N.W., in Washington. The informant reported

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* Sitting by designation pursuant to 28 U.S.C. § 292(a) (1976).

that the drugs were in the trunk of Bandit's automobile, a 1978 "purplish maroon" two-door Chevrolet Malibu with District of Columbia license plates. The informant also provided a detailed description of Bandit himself.

Detective Marcum, Detective David Cassidy, and Sergeant Raymon Gonzales drove to Ridge Street where they observed a car matching the informant's description. A radio check revealed that it was registered to an Albert Ross, Jr., who previously had used the alias of "Bandit." The police officers circled the block twice, then spotted the defendant driving the car. After stopping the vehicle and identifying themselves, the police asked Ross to step out of his car. Ross matched the description the informant had given Marcum. As Marcum conducted a body search, Gonzales observed a round of ammunition on the car's front seat. He looked for a pistol and found one in the glove compartment. Marcum arrested Ross and handcuffed him. Though the defendant offered evidence to the contrary, the police officers claim that Cassidy next searched the auto's trunk, where he found a closed but unsealed "lunch-type" brown paper bag and a closed red leather pouch or handbag. Cassidy opened the paper bag and discovered thirty glassine envelopes containing a white powder.[1] He left the bag and the pouch in the trunk, and the officers drove the car back to police headquarters. At the station, and still without having obtained a search warrant, Cassidy sent the glassine envelopes to the police laboratory for analysis.

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[1] Ross offered testimony that the officers did not open the paper bag until they returned to the police station. Inasmuch as our decision does not depend upon the existence of exigent circumstances to justify the warrantless searches in question, we need not decide whether the district court found that the police opened the paper bag at the time of arrest, as the officers testified. There is no dispute, however, that Detective Cassidy waited to open the red leather pouch until he returned to the police station.

He opened the red pouch and found $3,200 in currency; the laboratory later reported that the glassine envelopes contained heroin.

A federal grand jury in the District of Columbia indicted Ross on December 19, 1978, for possession of heroin, possession of heroin with intent to distribute, carrying a pistol without a license, and possessing a firearm after a felony conviction. Ross moved to suppress the evidence obtained from the search of the paper bag and the leather pouch. After an evidentiary hearing, the district judge denied the motion. A jury trial followed, and on March 21, 1979, Ross was convicted of possession of narcotics with intent to distribute, in violation of 21 U.S.C. § 841(a) (1976). Ross appeals his conviction.

II

Ross's initial argument is that the police lacked probable cause to stop and search his car. We disagree. Under *Aguilar v. Texas*, 378 U.S. 108 (1964), and *Spinelli v. United States*, 393 U.S. 410 (1969), probable cause may be based on the information supplied by an informant if the informant was credible and he obtained his information in a reliable way. *See United States v. Davis*, Nos. 78-2246 & 78-2247, slip op. at 30 (D.C. Cir. Oct. 26, 1979). One method of discovering an informant's credibility, that is, his truthfulness, is to examine his "track record" in providing police with accurate information. *Id. See Aguilar v. Texas*, 378 U.S. at 114 n.5. Here, undisputed testimony indicates the officers knew that this informant had supplied accurate information on prior occasions. Moreover, there is no challenge to the method in which the informant came upon his information: he was an eyewitness to actual sales of narcotics. Under these circumstances, we believe it clear that the police had probable cause to stop Ross and to search his car.

III

Not only did the police have the necessary probable cause, but under *Carroll v. United States*, 267 U.S. 132 (1925), and *Chambers v. Maroney*, 399 U.S. 42 (1970), the officers lawfully could search Ross's automobile, including its trunk, without a warrant. *See United States v. Hawkins*, 595 F.2d 751, 753 (D.C. Cir. 1978) (per curiam), *cert. denied*, 441 U.S. 910 (1979). Our only concern, then, is with the permissibility of the warrantless search of the containers they found in the trunk.

The fourth amendment dictates that "normally searches of private property [must] be performed pursuant to a search warrant issued in compliance with the Warrant Clause." *Arkansas v. Sanders*, 442 U.S. 753, 758 (1979). A search warrant represents more than a formality or technicality. "The mere reasonableness of a search, assessed in light of the surrounding circumstances, is not a substitute for the judicial warrant required under the Fourth Amendment." *Id. See United States v. Chadwick*, 433 U.S. 1, 8 (1977); *McDonald v. United States*, 335 U.S. 451, 455-56 (1948). Moreover, the Supreme Court has stated clearly and emphatically that exceptions to the warrant requirement are rare, and that the few recognized exceptions must be "jealously and carefully drawn . . . ." *Jones v. United States*, 357 U.S. 493, 499 (1958). *See also United States v. Jeffers*, 342 U.S. 48, 51 (1951).

Analysis of fourth amendment protection begins with the person making claim to that protection. Fourth amendment rights are not intrinsic attributes of a container or any other object. Instead, "rights assured by the Fourth Amendment are personal rights . . . [that] may be enforced by exclusion of evidence only at the instance of one whose own protection was infringed by the search and seizure." *Simmons v. United States*, 390 U.S. 377, 389 (1968), *quoted in Rakas v. Illinois*, 439

U.S. 128, 138 (1978). *Accord, Alderman v. United States*, 394 U.S. 165, 174 (1969). The defendant must establish that "the disputed search and seizure has infringed an interest of the defendant which the Fourth Amendment was designed to protect." *Rakas v. Illinois*, 439 U.S. 128, 140 (1978). *See id.* at 130 n.1.

To test whether the police officers' search of either the paper bag or the leather pouch invaded interests of Ross protected by the fourth amendment, we look to the expectation-of-privacy standard first enunciated in *Katz v. United States*, 389 U.S. 347 (1967), especially Justice Harlan's concurrence, *id.* at 360-62. *Smith v. Maryland*, 442 U.S. 735, 740 (1979); *Rakas v. Illinois*, 439 U.S. at 143. An interest is protected if two elements are present. First, as a subjective aspect, the defendant actually must have expected the preservation of his privacy. *Katz v. United States*, 389 U.S. at 361 (Harlan, J., concurring). Thus if the accused intentionally displayed the contents of his automobile to the police, he obviously did not expect the contents to remain hidden from police view. *See id.* at 351 (majority opinion). Second, as an objective aspect, the defendant's expectation must be one that society is prepared to recognize as reasonable. That is, the defendant must have relied justifiably on a freedom from governmental intrusion. *Id.* at 361 (Harlan, J., concurring).

In most cases, the extent of expectation that is reasonable will depend upon the circumstances at the time of the search. The Supreme Court has taken several factors into account: the precautions taken to preserve privacy, the manner in which the person claiming fourth amendment protection has used the place or item searched, the treatment accorded that place or item at the time the Framers adopted the fourth amendment, and finally, the applicable property rights. *See Rakas v. Illinois*, 439 U.S. at 152-53 (Powell, J., concurring) (summarizing

earlier cases). For example, a lower expectation may be justified when the defendant no longer possesses the searched item. Both the majority and the dissent in *Rakas* acknowledged that "perhaps the Constitution provides some degree less protection for the personal freedom from unreasonable governmental intrusion when one does not have a possessory interest in the invaded private place." *Id.* at 166 (White, J., dissenting), *quoted with approval in id.* at 146-47 (majority opinion). Similarly, the Supreme Court has held in automobile cases that the characteristics of cars, the manner of their use, and the degree of their regulation dilute the justifiable expectation of privacy. *See Chambers v. Maroney*, 399 U.S. 42 (1970); *Carroll v. United States*, 267 U.S. 132 (1925). *Accord, Arkansas v. Sanders*, 442 U.S. 753, 761 (1979).

In this case, however, we are not dealing with the search of a car but with the search of two containers. Our inquiry must focus on the reasonable expectation of privacy Ross had in the paper bag and the leather pouch. The contents of some containers, those the Supreme Court refers to as "common repositor[ies] for personal effects," are entitled to an expectation of privacy regardless of their location or the right to possess them. *Arkansas v. Sanders*, 442 U.S. 753, 763-66 (1979). Luggage, such as a footlocker or a suitcase, "is *inevitably* associated with the expectation of privacy." *Id.* at 762 (emphasis added). Because society recognizes luggage as a personal sanctuary, its presence within a car or its having fallen lawfully into public hands does not alter the reasonableness of an expectation that it will not be opened by the police. *Id.*; *Rakas v. Illinois*, 439 U.S. 128, 154 n.2 (1978) (Powell, J., concurring). Professor Wayne LaFave has observed that "[i]n *Chadwick*, the Court was able to say that the 'substantial infringement with respondents' use and possession' of the footlocker, justified by exigent circumstances, 'did not diminish respondents'

legitimate expectation that the footlocker's contents would remain private.'" 2 W. LAFAVE, SEARCH AND SEIZURE § 5.5, at 365 (1978) (quoting *United States v. Chadwick*, 433 U.S. 1, 13 n.8 (1977)). *Accord, id.* § 5.5 (Supp. 1980) (analysis unaffected by *Sanders*). *Cf. Pennsylvania v. Mimms*, 434 U.S. 106 (1977) (per curiam) (Court examines the legality of ordering the driver of a stopped vehicle out of his car by looking to the incremental invasion of privacy, given the stop).

The same circumstances that justified the search of Ross's automobile also justify a warrantless seizure of the paper bag and leather pouch, thereby depriving Ross of some of his possessory rights, at least temporarily. Our focus shifts to whether Ross reasonably could expect that after the bag and pouch were seized by the police, these containers nevertheless would remain unopened. In differentiating fourth amendment treatment of containers, parcels, and packages from that of personal luggage, the *Sanders* Court stated that although the need for a warrant to search nonluggage does not depend "upon whether they are seized from an automobile," [2] not all container types "deserve the full protection of the Fourth Amendment." *Arkansas v. Sanders*, 442 U.S. 753, 764 n.13 (1979). The Court left us without detailed guidance concerning just what nonluggage containers require a warrant before being searched. We must therefore determine whether a paper bag or a leather pouch may be searched immediately after their proper seizure, or if, like luggage, they may only be impounded until the police officers can obtain a warrant to search them. *See id.* at 772 (Blackmun, J., dissenting).

[2] Consequently, the police may not capitalize on a container's momentary presence in a vehicle as a pretext for searching the container without a warrant. In *Chadwick*, the Court disallowed the opening of a footlocker that the police had not attempted to search, although they had probable cause to do so, until the defendant stowed the footlocker in the trunk of a car. In *Sanders*, the police had probable cause to search Sanders' suitcase before it was placed in the taxicab trunk, *see* Arkansas v. Sanders, 442 U.S. 753, 766 (1979) (Burger, C.J., concurring in the judgment), but the police chose to wait. Nevertheless, although storing a container in a car does not suddenly strip the owner of his legitimate expectation of privacy in the container's contents, the presence of a container in an automobile may allow the police to discover and take possession of the container without a search warrant.

IV

We hold that absent unusual circumstances not present here, the fourth amendment does not forbid the police from opening a paper bag once it is properly in their hands. After analyzing the privacy expectation in a paper bag lawfully seized by police, we conclude that the fourth amendment does not protect any privacy interest in a closed but unsealed paper bag over and above the privacy justified by virtue of possession and control.

In traveling to this conclusion, we are fortunate that a portion of our path has been illuminated by the federal and the state courts that have already dealt with related situations. In general, invalidation of warrantless searches has been confined to the types of containers normally associated with personal luggage: a suitcase, a briefcase, a purse, a duffle bag, a backpack, a gym bag, a vinyl satchel, or a guitar case.[3] On the other hand,

[3] (1) *Suitcase*: United States v. Montano, 613 F.2d 147 (6th Cir. 1980) (per curiam); United States v. MacKay, 606 F.2d 264 (9th Cir. 1979); State v. Crutchfield, 123 Ariz. 570, 601 P.2d 333 (Ariz. Ct. App. 1979); Haughland v. State, 374 So. 2d 1026 (Fla. Dist. Ct. App. 1979); Buday v. State, 150 Ga. App. 686, 258 S.E.2d 318 (1979); State v. Gauldin, 44 N.C. App. 19, 259 S.E.2d 779 (1979); West Virginia v. Tomey, No. 14007 (W.Va. Oct. 16, 1979). *Cf.* United States v. Kralik, 611 F.2d 343 (10th Cir. 1979) (warrant to search car); State v. DeRusha, 74 Ill. App. 3d 641, 393 N.E.2d 619

(1979) (search permitted due to exigent circumstances); People v. Plantefaber, 91 Mich. App. 764, 283 N.W.2d 846 (1979) (exigent circumstances).

(2) *Briefcase*: United States v. Presler, 610 F.2d 1206 (4th Cir. 1979); Moran v. Morris, 478 F. Supp. 145 (C.D. Cal. 1979) (dictum); *In re* B.K.C., No. 13779 (D.C. Jan. 9, 1980); Webb v. State, 373 So. 2d 400 (Fla. Dist. Ct. App. 1979); Araj v. State, 592 S.W.2d 603 (Tex. Crim. App. 1979). *Cf.* United States v. White, 607 F.2d 203 (7th Cir. 1979) (exigent circumstances); United States v. Calendrella, 605 F.2d 236 (6th Cir.) (*Chadwick* not applied retroactively), *cert. denied*, 100 S. Ct. 522 (1979); United States v. Garcia, 605 F.2d 349 (7th Cir. 1979) (search incident to arrest); State v. Daniel, 589 P.2d 408 (Alas. 1979) (inventory search, decision based on Alaska constitution).

(3) *Portfolio*: United States v. Miller, 608 F.2d 1089 (5th Cir. 1979).

(4) *Purse*: Ulesky v. State, 379 So.2d 121 (Fla. Dist. Ct. App. 1979).

(5) *Wallet*: *Cf.* State v. Hlady, No. 79-165-C-2, CA 14189 (Or. Dec. 31, 1979) (search permitted as being incident to arrest).

(6) *Duffle bag*: United States v. Johnson, 588 F.2d 147 (5th Cir. 1979).

(7) *Backpack*: United States v. Meier, 602 F.2d 253 (10th Cir. 1979).

(8) *Gym bag*: State v. Marcum, 24 Wash. App. 441, 601 P.2d 975 (1979). *Cf.* State v. Hassapelis, 404 A.2d 232 (Me. 1979) (harmless error).

(9) *Tote bag*: People v. Minjares, 24 Cal. 3d 410, 591 P.2d 514, 153 Cal. Rptr. 224, *cert. denied*, 100 S.Ct. 181 (1979).

(10) *Travel bag*: People v. Little, 598 P.2d 140 (Colo. 1979) (en banc).

(11) *Guitar case*: United States v. Bella, 605 F.2d 160 (5th Cir. 1979) (per curiam).

(12) *Camera case*: State v. DeLong, 43 Or. App. 183 (1979) (decided under combination of *Sanders* and Oregon precedent).

[Continued]

courts generally have found warrantless searches permissible when confronted with containers dissimilar to luggage: an integral part of an automobile, an open knapsack, a taped electric razor case, a toolbox, a closed but unsealed department store box, or a closed but unsealed envelope.[4]

[3] [Continued]

But see State v. Dalton, 24 Cal. 3d 850, 598 P.2d 467, 157 Cal. Rptr. 497 (1979) (closed metal box), *cert. denied*, 48 U.S.L.W. 3611 (U.S. Mar. 24, 1980).

Though in United States v. Dien, 609 F.2d 1038 (2d Cir. 1979), the court held that a warrant was necessary to search three large cardboard boxes, the court predicated its conclusion on its findings that the use of plastic tape to seal the boxes and the secreting of the boxes behind covered windows "manifested an expectation that the contents would remain free from public examination." *Id.* at 1045.

[4] (1) *Integral part of the automobile*: United States v. Dall, 608 F.2d 910 (1st Cir. 1979) (camper cap).

(2) *Unlatched knapsack*: State v. Schrier, 283 N.W.2d 338 (Iowa 1979).

(3) *Closed satchel*: United States v. Milhollan, 599 F.2d 518 (3d Cir.), *cert. denied*, 100 S.Ct. 221 (1979) (three Justices would have granted the writ and reversed under *Sanders*).

(4) *Taped electric razor case*: Cooper v. Commonwealth, 577 S.W.2d 34 (Ky. Ct. App. 1979).

(5) *Closed but unlocked toolbox*: Wyss v. State, 262 Ark. 502, 558 S.W.2d 141 (1977).

(6) *Closed but unsealed department store box*: United States v. Neumann, 585 F.2d 355 (8th Cir. 1978) (inventory search permitted because boxes cannot be closed securely).

(7) *Envelopes*: United States v. Duckett, 583 F.2d 1309 (5th Cir. 1978).

(8) *Plastic bags*: United States v. Gooch, 603 F.2d 122 (10th Cir. 1979); United States v. Ficklin, Nos. 77-2923 & 77-3220 (9th Cir. Feb. 10, 1978) (memorandum) (plastic and burlap bags), *cert. denied*, 439 U.S. 925 (1978), *quoted in* United States v. Stevie, 582 F.2d 1175, 1179 n.4 (8th Cir.

Several courts have looked at paper bags in particular, and have concluded a search is permissible after their seizure. In *United States v. Andrews*, No. 79 Cr. 374 (MJL) (S.D.N.Y. Nov. 2, 1979), an undercover agent had seen a brown paper bag and a vial of clear liquid, taken from the bag, which had been identified as the "juice." Later, after surveillance, police arrested the driver of a car. While searching the car's trunk, the arresting officer observed a brown paper bag. Searching the paper bag, the officer found the vial previously shown to the undercover agent. Although citing *Arkansas v. Sanders*, the court denied a motion to suppress without discussing the warrantless search of the bag. In *Clark v. State*, 574 P.2d 1261 (Alas. 1978), a search of defendant's rental car uncovered a paper bag in the glove compartment. Still without a warrant, the police officer opened the bag and discovered it contained narcotics. Affirming Clark's conviction, the Alaska Supreme Court compared this case with *Chadwick* and concluded that the expectation of privacy was much lower in a paper bag's contents than in a footlocker's. Reaching the same conclusion, the court in *Webb v. State*, 373 So. 2d 400 (Fla. Dist. Ct. App. 1979), noted that there are

> arguable differences between the reasonable expectation of privacy one might attach to a paper bag as opposed to a briefcase or luggage of some type. Whereas "luggage is a common repository for one's personal effects, and therefore is inevitably associated with the expectation of privacy," *Arkansas v.*

1978), *cert. denied*, 99 S.Ct. 3102 (1979); Flynn v. State, 374 So.2d 1041 (Fla. Dist. Ct. App. 1979).

(9) *Paper bags*: United States v. Vento, 533 F.2d 838 (3d Cir. 1976); United States v. Andrews, No. 78 Cr. 374 (MJL) (S.D.N.Y. Nov. 2, 1979) (approved without discussion although *Sanders* cited elsewhere in opinion); Clark v. State, 574 P.2d 1261 (Alas. 1978); Webb v. State, 373 So. 2d 400 (Fla. Dist. Ct. App. 1979) (dictum).

> *Sanders*, supra, the same does not hold true to paper bags.

Id. at 403. Courts have also found the contents of opaque plastic bags, containers comparable to paper bags, to be entitled to a lesser expectation of privacy than personal luggage. *See United States v. Ficklin*, Nos. 77-2923 & 77-3320 (9th Cir. Feb. 10, 1978) (memorandum), *cert. denied*, 439 U.S. 825 (1978), *quoted in United States v. Stevie*, 582 F.2d 1175, 1179 n.4 (8th Cir. 1978), *cert. denied*, 99 S. Ct. 3102 (1979); *Flynn v. State*, 374 So. 2d 1041 (Fla. Dist. Ct. App. 1979) (contrasting *Sanders*).

Recitation of precedent does not by itself determine whether Ross continued to have a reasonable expectation of privacy after his paper bag was lawfully seized by police. We must also rely on our own analysis of when a legitimate expectation of privacy attaches to a given container, so that absent exigent circumstances, a search requires a warrant. As the Supreme Court declared in *Rakas v. Illinois*, "it would, of course, be merely tautological to fall back on the notion that those expectations of privacy which are legitimate depend primarily on cases deciding exclusionary rule issues in criminal cases." 439 U.S. at 143 n.12. Instead, "[l]egitimation of expectation of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society." *Id. See Smith v. Maryland*, 442 U.S. 735 (1979) (society not prepared to recognize expectation of privacy in identity of telephone numbers called from another telephone). We therefore must decide what "sense of security" should exist in society, and we must do so at least in part by looking at "the customs and values of the past and present . . . ." *United States v. White*, 401 U.S. 745, 786 (1971) (Harlan, J., dissenting), *quoted in* 1 W. LaFave, Search

AND SEIZURE § 2.1, at 231 (1978). Other important considerations include the precautions taken to preserve privacy, the manner in which the paper bag was used, and the property rights in the bag at the time of the search. *See* pp. 6-7 *supra*. *See also* Note, *From Private Places to Personal Privacy: A Post-Katz Study of Fourth Amendment Protection*, 43 N.Y.U.L. Rev. 968, 983-84 (1968) ("The degree of privacy offered by structural characteristics, such as partitions or walls, is an important determinant of an area's character.").

If a paper bag were a form of luggage, our task would be a simple one: *Sanders* requires a warrant before searching any piece of luggage. Paper bags differ from personal luggage in two material respects, however. First, paper bags offer at best only minimal protection against accidental and deliberate intrusions. A paper bag can fall open or break very easily. It presents no real obstacles to invasions by the curious or the dishonest once it has left its owner's actual possession. Because it is neither so secure nor so permanent as typical forms of luggage, its contents are much more likely to become subject to public display than if the same items had been stored in luggage. Thus, it is doubtful that one realistically can expect a paper bag to remain closed or intact, its contents unrevealed, at least if it has left its owner's hands. *Cf. United States v. Neumann*, 585 F.2d 355 (8th Cir. 1978) (cardboard boxes not secure; inventory search justified).

Second, paper bags are not *inevitably* associated with the expectation of privacy. *See Arkansas v. Sanders*, 442 U.S. 752, 762 (1979). Although a paper bag *may* be pressed into service as a repository of personal effects, we do not believe a reasonable man would identify a paper bag as a normal place to entrust his intimate personal possessions. In contrast, luggage in general serves to carry clothes, toiletries, and other items associated with

day-to-day living. Luggage typically functions as a portable closet and chest of drawers; it follows that a person could justifiably maintain a substantially higher expectation of privacy in his personal luggage than in a paper bag.[5]

We therefore must decide whether, under the circumstances of this case, Ross had a reasonable expectation of privacy in the paper bag that the police discovered during the lawful search of the trunk of his car. The officers had reason to believe that the trunk was the warehouse for Ross's narcotics sales. Thus it was serving as more than simply a luggage compartment. When the police in searching the trunk came upon a paper bag, there was not indication that it was being used to carry intimate, private items. *See United States v. Dien*, 609 F.2d 1038 (2d Cir. 1979). *See generally United States ex rel. Cunningham v. Follette*, 397 F.2d 143, 145 (2d Cir. 1968), *cert. denied*, 393 U.S. 1058 (1969); *Walker v. United States*, 327 F.2d 597, 600 (D.C. Cir. 1963), *cert. denied*, 377 U.S. 956 (1964).[6] No one disputes that they

[5] We do not, as the dissent suggests, create a rule that only luggage is protected by the fourth amendment. Because society always associates luggage with privacy, the fourth amendment must always protect it. This is not an intrinsic characteristic of the luggage but a legal application of society's manifested expectations—an extrinsic quality, so to speak. Because a paper bag is not a piece of luggage, however, we must undertake the more general inquiry of whether under the facts before us this particular container suggests an expectation of privacy. After examining those facts, we have concluded that Ross's paper bag did not connote such an expectation of privacy. Therefore, there was no privacy interest for the fourth amendment to protect.

[6] There was no evidence that Ross employed the paper bag as a substitute for luggage, nor do the facts and circumstances manifest any special expectation of privacy. If, for example, the police had found the paper bag amidst suitcases or other luggage, there would have been a stronger indication that the bag was pressed into service as a repository of personal

had the right to seize the bag to prevent the destruction of its contents, that is, the destruction of possible evidence. *See Arkansas v. Sanders*, 442 U.S. at 762; *United States v. Chadwick*, 433 U.S. 1, 13 (1978). Because a paper bag's general vulnerability suggests no reasonable expectation of privacy after its seizure, *see* p. 14 *supra*, and because the police justifiably believed that *this* paper bag was not being used to store personal items, the police lawfully could open it without violating Ross's fourth amendment rights.

In the final analysis, our determination of what "sense of security" should exist in society must be based upon general experience and judgment. The facts in this case lead us to conclude that Ross could not reasonably harbor an expectation of privacy in his paper bag beyond that existing due to actual possession, which is all that enables one to protect a paper bag's contents from public exposure. If, as the *Sanders* decision suggests, there are containers that the police, after a proper seizure, may open without a search warrant, Ross's bag must be among the best examples. Thus we agree with Professor LaFave that compared to the warrantless search of luggage, "when the [searched] effects are such things as coats and paper bags, the possessory interest and privacy interest are must less distinct, and it is thus far easier to conclude that the [privacy] interest is not protected by the Warrant Clause whenever exigent circumstances allow a warrantless intrusion upon the [possessory] interest." 2 W. LAFAVE, SEARCH AND SEIZURE § 5.5, at 365 (1978). *Accord, id.* § 5.5 (Supp. 1980) (analysis unaffected by *Sanders*).

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effects. Similarly, if Ross had sealed the paper bag shut, manifesting a special expectation of privacy, the intrusion of a search would have been more than negligible and a search warrant would have been required. In any situation approaching a borderline case, the police would best be cautious, and obtain a proper search warrant before proceeding.

V

With respect to Ross's red leather pouch, *Sanders* controls directly. *See* pp. 7, 14 *supra*. As a type of personal luggage, the pouch, in the words of *Sanders* itself, is a "common repository for one's personal effects, and therefore is inevitably associated with the expectation of privacy." *Arkansas v. Sanders*, 442 U.S. 753, 762 (1979). Absent a valid warrant or one of the few recognized exceptions, any evidence secured from the leather pouch should be excluded when determining Ross's criminal culpability.

The Government attempts to bring the warrantless search of the leather pouch within the exception for searches incident to a lawful arrest. The attempt fails. Ross does not challenge a police search of his person or of any object associated with his person at the time of his arrest. *See United States v. Robinson*, 414 U.S. 218 (1973). When Detective Cassidy seized the pouch and later opened it at police headquarters, it was far from Ross's reach and in the exclusive control of the police. There was no danger Ross might gain access to the pouch and retrieve a weapon or destroy evidence. The police officers had no reason to believe that the pouch contained explosives or any other item that might prove hazardous to themselves or to the public. Ross's arrest cannot excuse a search made a substantial time later and a substantial distance away. *Preston v. United States*, 376 U.S. 364, 367 (1964). *See generally United States v. Chadwick*, 433 U.S. 1, 15 (1977); *Chimel v. California*, 395 U.S. 752, 763-64 (1969).

We hold that none of the "specifically established and well-delineated exceptions," *Katz v. United States*, 384 U.S. 347, 357 (1967), to the warrant requirement applied and that the police failed to follow "'the procedure of antecedent justification before a magistrate that is central to the Fourth Amendment . . . .'" *Osborn*

v. United States, 385 U.S. 323, 330 (1966) (quoting *Ohio ex rel. Eaton v. Price*, 364 U.S. 263, 272 (1960) (opinion of Brennan, J.) (equally divided Court)). The currency found in the red leather pouch should have been suppressed as evidence.[7]

VI

Because Ross's conviction rested in part on evidence that the police obtained through an unlawful search, the conviction is reversed and the case remanded for proceedings not inconsistent with this opinion.

It is so ordered.

[7] The Government's counsel conceded at oral argument that the $3,200 in currency found in the pouch was essential to the Government's charge of narcotics possession with intent to distribute, the only crime Ross was convicted of having committed. We are thus unable to excuse introduction of the evidence as harmless error. *See, e.g.*, United States v. James, 473 F.2d 115 (D.C. Cir. 1972).

BAZELON, *Senior Circuit Judge, concurring in part and dissenting in part*: This case involves the warrantless search of a zippered leather pouch and a closed paper bag seized from the trunk of an automobile. The majority holds that the search of the pouch was unconstitutional. I agree. However, the majority finds a constitutionally significant difference between the pouch and the paper bag. Based upon this "difference," it holds that the warrantless search of the bag was permissible. With all due respect, I think that this view stands the Fourth Amendment on its head, ignores the increased invasion of privacy that a search constitutes over a seizure, and disregards the teaching of the Supreme Court in this area. Fundamental principles of constitutional law require a warrant to justify the search of a paper bag in the circumstances of this case. I dissent from the majority's holding insofar as it upholds the warrantless search of appellant's bag.

I

The Fourth Amendment demands that "normally searches of private property be performed pursuant to a search warrant issued in compliance with the warrant clause."[1] Thus, it has long been clear that "searches conducted outside of the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions."[2] Each of these exceptions has been "jealously and carefully drawn."[3] Always, "the burden is on those seeking the exemption to show the need for it."[4]

[1] Arkansas v. Sanders, 99 S. Ct. 2586, 2590 (1979) (footnote omitted).

[2] Katz v. United States, 389 U.S. 347, 357 (1967).

[3] Jones v. United States, 357 U.S. 493, 498-99 (1958).

[4] United States v. Jeffers, 342 U.S. 48, 51 (1951). *See also* Katz v. United States, 389 U.S. 347, 357 (1967).

In the case at hand, the constitutionally mandated inquiry is whether the government has shown that the search of the bag fell within one of the few specifically established and well-delineated exceptions to the warrant requirement. The government has failed to make such a showing. First, this is not an "automobile exception" case.[5] The Supreme Court has said in the clearest of terms that "the extent to which the Fourth Amendment applies to containers and other parcels depends *not at all* upon whether they are seized from an automobile." [6] Therefore, the determination of the propriety of the search of the paper bag must be made without regard to its location in the automobile trunk.[7] Second, none of the other recognized exceptions to the warrant requirement applies. The officers did not obtain Ross' permission before searching the bag.[8] The government does not claim that exigent circumstances were present to justify the search.[9] The bag was not in an area within Ross' control at the time of his arrest.[10] And, the contents of the bag were not in plain view.[11]

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[5] *See* Carroll v. United States, 267 U.S. 132 (1925).

[6] Arkansas v. Sanders, 99 S. Ct. 2586, 2593-94 n.13 (1979) (emphasis added).

[7] The majority concedes as much. Majority Opinion at 7 ("In this case, however, we are not dealing with the search of a car but with the search of two containers.").

[8] *See* United States v. Watson, 423 U.S. 411 (1976).

[9] For example, the government does not allege that there was any fear on the part of the officers that the paper bag contained something that posed a danger to them or to others. If a reasonable apprehension of danger were justified, we would have a different case from the one at hand—one where a search might be proper.

[10] *See* Chimel v. California, 396 U.S. 72 (1969).

[11] *See* Harris v. United States, 390 U.S. 234 (1968).

Perhaps the majority is attempting to define some new exception to the warrant requirement. If so, however, its opinion does not make clear what the nature of this new exception might be. Moreover, it is settled that any new exception would have to be necessary to accommodate a vital societal interest, and its reach would be limited to just what is required for that accommodation.[12] Neither the court nor the government suggests that, in the circumstances of this case, the warrantless search of the paper bag was necessary to accommodate a societal interest.

It is undisputed that the bag was Ross' personal property, and that it was searched without a warrant. In the absence of a showing that this warrantless search fell within one of the exceptions to the warrant requirement, fundamental principles of constitutional law require the conclusion that the warrantless search of the bag was in violation of the Fourth Amendment.

II

My distinguished brethren give the foregoing exegesis of Fourth Amendment doctrine only a passing nod.[13] They would apparently dispense with these well-settled principles in favor of what can only be considered an entirely novel approach. Instead of requiring those seeking an exemption from the warrant requirement to show the need for one, the majority would ask the defendant in each case to demonstrate to the court's satisfaction that his personal possessions should be entitled to the protection of the Fourth Amendment.[14]

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[12] Mincey v. Arizona, 437 U.S. 385, 393 (1978); United States v. Chadwick, 433 U.S. 1, 15 (1977); Coolidge v. New Hampshire, 403 U.S. 443, 455 (1971).

[13] Majority Opinion at 5.

[14] Majority Opinion at 6.

This inversion of values is accomplished in the following manner. The court begins by acknowledging the fact that "the Supreme Court has stated clearly and emphatically that exceptions to the warrant requirement are rare." [15] Then, it embarks upon an analysis of recent Supreme Court decisions which wrenches those decisions from their context and transmutes them to render the warrant requirement totally irrelevant whenever a court perceives an insufficient privacy interest in a defendant's personal belongings.

Most prominently, the court today construes *Rakas v. Illinois* [16] and several other cases to support the proposition that even when the defendant is contesting a search of his own private property, he must demonstrate an independent privacy interest in order to invoke the protection of the Fourth Amendment.[17] However, the cases do not support that proposition. They are all standing cases. In such cases, the party seeking to assert a Fourth Amendment claim must show that his own rights have been abridged.[18] In each of the cases cited by the majority, a defendant sought to invoke the Fourth Amendment to suppress evidence obtained in a search of property with which he had no apparent relationship. Since *ownership* was not available to provide standing, the Court applied the "expectation-of-privacy" test first enun-

[15] Majority Opinion at 5.

[16] 439 U.S. 128 (1978).

[17] Majority Opinion at 6.

[18] The majority opinion quotes *Rakas* as requiring the defendant to establish that "the disputed search and seizure has infringed an interest of the defendant which the Fourth Amendment was designed to protect." Majority Opinion at 6. The three words "of the defendant" in the Supreme Court's opinion signify that Court's concern with whether the party seeking suppression was asserting an invasion of *his own* property or privacy.

ciated in *Katz v. United States* [19] to determine whether some basis independent of ownership existed to provide standing. In so doing, the Court did not cut back upon the traditional capacity of property owners to invoke the Fourth Amendment. Rather, it made clear that the *Katz* "expectation-of-privacy" test operates as an addendum to the traditional test of ownership, and it clarified the scope of the *Katz* test. Thus, for example, the *Rakas* Court said that Fourth Amendment protection may be conferred "*either* by reference to concepts of real or personal property law *or* to understandings [of the legitimate expectation of privacy] that are recognized and permitted by society."[20]

The language quoted by my colleagues cannot obscure the fact that, whatever else may be true about the scope of the Fourth Amendment, personal property is *presumptively* protected against warrantless searches.[21] After all, the Framers drafted the Amendment to safeguard

[19] 389 U.S. 347 (1967).

[20] 439 U.S. 128, 143-44 n.12 (1978) (emphasis added). At least four other times in the *Rakas* opinion, the Supreme Court makes the point that the warrant requirement applies *either* where personal property is involved *or* where a generally recognized expectation of privacy exists. *See, e.g.*, 439 U.S. at 134, 136, 142 n.11, 148.

[21] Katz v. United States, 389 U.S. 347, 357 (1967). *Compare* Majority Opinion at 5-6. The majority is apparently uncomfortable with the position it stakes out, for the its opinion is internally inconsistent on the question of whether property is presumptively protected. At one point, the opinion pronounces: "Fourth Amendment rights are not intrinsic attributes of a container or any other object." Majority Opinion at 5. At another point, it is said that "[t]he contents of some containers . . . are entitled to an expectation of privacy regardless of their location or the right to possess them." *Id.* at 7. Luggage, the majority concedes, is inevitably protected. *Id.* A warrant is always required before searching a piece of it. *Id.* at 14. Thus, it appears to be an "intrinsic attribute" of some types of containers that they are protected.

our citizens against unnecessary intrusions by governmental authorities into their personal lives.[22] And the plain language of the Amendment declares that the people will be "secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." *Katz* itself teaches that although the Amendment "protects individual privacy against certain kinds of governmental intrusion, . . . its protections go further, and often have nothing to do with privacy at all." [23]

The property interest defines a *core* of Fourth Amendment protection. This is available regardless of actual expectations, and notwithstanding judicial assessments of the adequacy of privacy-creating precautions. The privacy interest defines an *additional* zone of protection based upon the reasonable expectations of the actor. Most importantly, in either case, the presumption is that "searches conducted outside of the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment.[24] The majority shifts that presumption by requiring the defendant to demonstrate that the searched property was associated with the expectation of privacy.[25] This confounds the Constitution.

III

Even if the validity of the search of the bag were to be judged solely by the "expectation-of-privacy" test, I would be forced to reject the answer proffered in the majority opinion.

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[22] Justice Frankfurter suggested that unwarranted searches by British authorities were one of the potent causes of the Revolution. United States v. Rabinowitz, 339 U.S. 56, 69 (1950) (dissenting).

[23] Katz v. United States, 389 U.S. 347, 350 (1967). *See also*, Spinelli v. United States, 393 U.S. 410, 412 n.2 (1969); Alderman v. United States, 394 U.S. 165, 176-80 (1969).

[24] Katz v. United States, 389 U.S. 347, 357 (1967).

[25] Majority Opinion at 6.

A.

In applying the "expectation-of-privacy" test, the court once again reads recent Supreme Court decisions to effect a dramatic shift in Fourth Amendment analysis. In particular, the inversion of values that characterizes the court's general approach to the Fourth Amendment is recapitulated in its discussion of the "automobile exception" cases, *United States v. Chadwick* [26] and *Arkansas v. Sanders*.[27] In each of these cases, the defendant sought to suppress evidence the police had obtained by searching a container found in the trunk of an automobile. In *Chadwick*, the container was a footlocker; in *Sanders*, a suitcase. First in *Chadwick*, and again in *Sanders*, the Court sought to clarify the scope of the "automobile exception" to the warrant requirement. In the clearest of language, it sought to limit that exception: the exception authorizes warrantless searches of automobiles—and nothing more. As the *Sanders* Court put it, "the extent to which the Fourth Amendment applies to containers and other parcels depends not at all upon whether they are seized from an automobile." [28] The Court underscored the impropriety of the searches before it by contrasting the expectation of privacy associated with the searched containers with the unique qualities of an automobile: luggage "is inevitably associated with the expectation of privacy." [29] But the majority turns these cases inside out by seizing upon this language and reading it as creating a "luggage rule" rather than as limiting the "automobile exception." Instead of applying *Chadwick* and *Sanders* to render irrelevant the presence of the brown bag in the trunk of Ross' car, the majority construes

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[26] 433 U.S. 1 (1976).

[27] 99 S. Ct. 2586 (1979).

[28] *Id.* at 2493-94 n.13.

[29] *Id.*

those cases as mandating an inquiry into whether or not a brown bag is luggage. Under this novel "luggage rule," if a defendant can establish that a container is "luggage," he "merits" the protection of the warrant requirement. If, however, a defendant is unable to establish the container is "luggage," the warrant requirement does not apply. To read *Chadwick* and *Sanders* in this way is to ignore—to subvert—the Court's effort to limit the "automobile exception." And, of course, such a rule turns the presumption of Fourth Amendment protection inside out.

The majority concedes that, were we dealing with a suitcase, the case would fall squarely within the Supreme Court's holding in *Arkansas v. Sanders*, and a search warrant would be required.[30] As the *Sanders* Court put it:

> Where—as in the present case—the police, without endangering themselves or risking loss of the evidence, lawfully have detained one suspected of criminal activity and secured his suitcase, they should delay the search thereof until after judicial approval has been obtained. In this way, the constitutional right of suspects to prior judicial review of searches will be fully protected.[31]

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[30] Majority Opinion at 7.

[31] 99 S. Ct. at 2594. It may be true that there is little doubt that a warrant would have been issued if sought. But this is irrelevant. As the Court put it in *Chadwick*:

> Even though on this record the issuance of a warrant by a judicial officer was reasonably predictable, a line must be drawn. In our view, when no exigency is shown to support the need for an immediate search, the Warrant Clause places the line at the point where the property to be searched comes under the exclusive dominion of police authority. Respondents were therefore entitled to the protection of the Warrant Clause with the evaluation of a neutral magistrate, before their privacy interests in the contents of the footlocker were invaded.

433 U.S. at 15-16 (footnote omitted).

Of course, the containers seized by the police in this case were not suitcases. They were a red leather pouch and a closed brown bag. The majority extends the warrant requirement to the red leather pouch with a single dependent clause: "*As a type of personal luggage*, the pouch, in the words of *Sanders* itself, is a 'common repository of personal effects, and therefore is inevitably associated with the expectation of privacy.' "[32] No reasons are given to explain why a red leather pouch is "a type of personal luggage." But, whatever its reasons for calling the pouch "luggage," the majority refuses to extend the favor of that word to the closed brown paper bag.

The majority asserts that the *Sanders* Court "left us without detailed guidance concerning just what nonluggage containers require a warrant before being searched."[33] This is wrong. The *Sanders* Court provided guidance with the following language:

> Not all *containers* and *packages* found by police during the course of a search will deserve the full protection of the Fourth Amendment. Thus, some *containers* (for example a kit of burglar tools or a gun case) by their very nature cannot support any reasonable expectation of privacy because their contents can be inferred from their outward appearance. Similarly, in some cases the contents of a package will be open to "plain view," thereby obviating the need for a warrant.[34]

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[32] Majority Opinion at 17 (emphasis added).

[33] Majority Opinion at 9.

[34] 99 S. Ct. at 2593-94 n.13 (emphasis added). We note specifically that the *Sanders* Court used the words "containers" and "parcels" and not the more restrictive word "luggage" to describe the class of items protected by the Warrant Clause. This is a clear indication that the Court viewed more than luggage—indeed that it viewed, as it said, even "parcels"—as protected by that Clause.

In short, the containers or parcels that do *not* deserve the full protection of the Fourth Amendment are those that display their contents by their nature. Clearly, the closed brown paper bag was not a container whose "contents can be inferred from [its] outward appearance." And its contents were not in plain view. Therefore, it did not fall within the exceptions to the warrant requirement expressly articulated by the *Sanders* Court.

Of course, the exceptions expressly articulated by the Court may not exhaust the list of possible exceptions. But given the presumption against exceptions to the warrant requirement, the paper bag must be considered a "container" or "parcel" to which full Fourth Amendment protections apply in the absence of some indication to the contrary. In holding otherwise, the majority makes the level of constitutional protection available to a citizen dependent on his ability to purchase a fancy repository for his belongings. This is an unacceptable standard. When a citizen takes the trouble to close a bag over his belongings, he manifests a privacy interest that deserves protection. The fact that the repository of personal effects is less expensive than a piece of luggage is of no import.

B.

To an extent, the majority's application of the "expectation-of-privacy" test proceeds independent of its novel "luggage rule." The paper bag is singled out for lesser protection by asserting that "a lower expectation of privacy may be justified when [a] defendant no longer possesses the searched item." [35] Applying this assumption

[35] Majority Opinion at 7. This provides an interesting postscript to the argument just analyzed. Significantly, the majority does not claim that a suitcase, once seized, loses the expectation of privacy associated with it. Nor does it claim that a red leather pouch, once seized, is less protected. Somehow, the "diminished expectation of privacy" that follows a seizure is reserved for paper bags.

here, the focus of the majority's inquiry becomes "whether Ross reasonably could expect that *after the bag* [was] seized by the police [it] nevertheless would remain unopened." [36] In the majority's view, he could not—and, thus, the fact of seizure is used to discount Ross' privacy interest in his private property.[37] This is painfully obvious bootstrapping. It is unsupported by precedent,[38] and it is contrary to the teachings of the Supreme Court.

Once again, *Sanders* and *Chadwick* are relevant. In *Sanders*, the Court took pains to note that the expectations of privacy that attends a container is not diminished "merely because [it] is to be carried in an automobile rather than transported by other means or temporarily checked or stored." [39] My brethren circumvent the rule of *Sanders* by inserting an extra step. The auto-

[36] Majority Opinion at 8 (emphasis added).

[37] The majority feels constrained to justify the *seizure* of the paper bag by reference to the automobile exception to the warrant requirement. Majority Opinion at 8. Since, by hypothesis, the majority views the Fourth Amendment and the "reasonable expectation of privacy" as co-extensive, this means that the majority concedes that there was an expectation of privacy about the bag *prior to* its seizure by the police. It is therefore incumbent upon the majority to demonstrate that the fact of seizure somehow dissipates the privacy interest appellant Ross had in the bag.

[38] The majority cites only Rakas v. Illinois as support for its position. Majority Opinion at 7. But the passage in *Rakas*, which appears in the dissent, says only that "*perhaps* the Constitution provides some degree less protection" when the defendant has *no* possessory interest in a *place* that is the subject of a search. Rakas v. Illinois, 439 U.S. 128, 166 (1978). In the case at hand, Ross maintained *some* possessory interest in the paper bag—even after it was seized. And, of course, we are dealing with Ross's *private property*, not a *place* owned by some third party.

[39] 99 S. Ct. 2586, 2593 (1979).

mobile exception is used to justify the seizure of the paper bag. Then, the seizure is used to reduce the expectation of privacy attending the paper bag, and thereby to justify the search. Through this legerdemain, the automobile is used to diminish the expectation of privacy associated with the paper bag—precisely the result forbidden by *Sanders*.

In *Chadwick* and again in *Sanders*, the Supreme Court examined the propriety of searches of containers that had been lawfully seized. Both times, the Court made the point that precisely because the containers had been seized—had been immobilized—a warrantless search was unnecessary and impermissible.[40] The police had control of the containers, the Court said, so there was no danger of anything untoward happening to the evidence while they waited to get a warrant. Moreover, a search involves a far greater intrusion into Fourth Amendment values than does impoundment. Thus, "the principle of lesser intrusion" would "mandate obtaining judicial permission before effectuation of the more intrusive search." [41] I respectfully submit that the court today ignores this clear teaching of the Supreme Court. The seizure of the paper bag does not justify a warrantless search—on the contrary, it forbids it.[42]

C.

The court's conclusion that Ross did not have a reasonable expectation of privacy in the contents of the bag once it was in police hands is, at bottom, based upon the

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[40] 99 S. St. at 2592-94; 433 U.S. at 13-16.

[41] United States v. Chadwick *And the Lesser Intrusion Concept: The Unreasonableness Of Being Reasonable,* 58 B.U. L. REV. 436, 466-67 (1978).

[42] The rule proposed by the majority would have the undesirable effect of encouraging seizures that might not otherwise occur, because the seizures would serve as the basis for otherwise impermissible searches.

unadorned notion that in the very nature of things: "It just *can't be* that a brown paper bag has an expectation of privacy about it!"

We are told first, that a paper bag offers "at best only minimal protection against accidental and deliberate intrusion;" it "can fall open or break very easily;" it can easily be invaded by the "curious or dishonest;" in short, a paper bag is "neither so secure nor so permanent as typical forms of luggage." [43] The majority finds this putative distinction constitutionally significant. But surely, the applicability of the warrant requirement cannot turn on whether a person carries his belongings in a frayed cloth suitcase or new American Tourister. Is the court saying that if Ross had used two or three paper bags inside one another, thereby rendering the contents more secure, the police would have been required to obtain a warrant prior to the search? The majority does concede that if Ross had taped the paper bag shut, a warrant would have been required.[44] Does this mean there is a constitutionally significant difference between taping a bag shut and closing it by folding it over? And, how is a taped bag any less fragile than an untaped one?

We are told, second, that the majority does "not believe a reasonable man would identify paper bags as a normal place to entrust his intimate personal belongings." [45] Can such speculation about what a "reasonable man" thinks about paper bags be attributable to anything but "acute ethnocentric myopia?" [46] The simple

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[43] Majority Opinion at 14.

[44] Majority Opinion at 15-16 n.6.

[45] Majority Opinion at 14.

[46] FCC v. Pacifica Foundation, 438 U.S. 726, 775 (1979) (Brennan, J., dissenting) (Majority approved an FCC ruling "channelling" the use of certain words to certain broadcast times; Justice Brennan noted that the proscribed words were the coin of expression in some of our subcultures).

fact is that in some of our subcultures paper bags are often used to carry intimate personal belongings. And, the sight of some of our less fortunate citizens carrying their belongings in brown paper bags is too familiar to permit such class biases to diminish protection of privacy. Moreover, there is no constitutional basis for saying that only repositories of "*intimate* personal belongings" [47] implicate privacy interests.

At bottom, the reason the majority refuses to extend the warrant requirement to the paper bag is its determination that in society's "general experience and judgment," the use of a bag does not provide its owner "a sense of security." [48] There can be no doubt that the *general* experience is that a great many people would see a paper bag as implicating privacy. It seems to me unduly presumptuous—and dangerous—to proffer a single understanding of the privacy associated by different kinds of people with different kinds of containers.

I reach a result different from the majority based not only upon my different understanding of "general experience and judgment," but also upon constitutional analysis. First, the constitution does not limit the protection of the warrant requirement to those items of personal property which "general experience and judgment" dictate require protection. The Fourth Amendment applies to all items of personal property.[49] Second, there is a strong presumption against *any* warrantless search of personal property.[50] And, third, under the standard enunciated by the Supreme Court in *Arkansas* v. *Sanders*, the containers involved in this case merit the protection of the warrant requirement. This is so even

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[47] Majority Opinion at 14.

[48] Majority Opinion at 16.

[50] *See* Part I *supra*.

[49] *See* Part II *supra*.

if the majority is correct in assuming that the existence *vel non* of Fourth Amendment protection turns on a linguistic analysis of the word "luggage" and its variations.

IV

While conceding that "recitation of precedent does not by itself determine whether Ross [had] a reasonable expectation of privacy," [51] the majority compiles an extensive list of cases tangentially related to the case at hand. The vast majority of the cases cited are clearly irrelevant. Most deal with containers which, even on the restrictive standard proposed in today's majority opinion, "merit" the protection of the warrant requirement. And many predate the Supreme Court's decision in *Arkansas* v. *Sanders*, a decision which did much to clarify the law in this area.

More important, the case law the majority cites to support the conclusion that a paper bag is not protected against a warrantless search, in fact, supports the opposite conclusion.[52] For example, in *People v. Marshall*, the California Supreme Court invalidated the warrantless search of a paper bag. Chief Justice Traynor wrote:

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[51] Majority Opinion at 13.

[52] Of the four cases cited by the majority involving paper bags, Majority Opinion at 12-13 and 12 n.4(9), two predated *Sanders*, United States v. Vento, 533 F.2d 838 (3d Cir. 1976); Clark v. United States, 574 P.2d 1261 (Alas. 1978), and the other two treated the propriety of the search of the paper bag only in *dictum*, United States v. Andrews, No. 78 Cr. 374 (MJL) (S.D.N.Y. No. 2, 1979); Webb v. State, 373 So.2d 400 (Fla. Dist. Ct. App. 1979). Indeed, one of the two cases that predated *Sanders*, Clark v. State was later limited by that court. State of Alaska v. Daniel, 589 P.2d 408 (Alaska 1979). *Daniel* explained that the search of the paper bag at issue in *Clark* was permitted because of exigent circumstances (the danger that the evidence would be destroyed). The *Daniel* court made clear that the *Clark* case was not decided on the issue of expectation of privacy.

> The fact that the container was only a brown paper bag instead of a packing box, purse, handbag, briefcase, hatbox, snuffbox, trunk, desk or chest of drawers . . . is immaterial. It is inherently impossible for the contents of a closed opaque container to be in plain view regardless of the size of the container or the material it is made of. A search of the container is necessary to disclose its contents. A search demands a search warrant.[53]

The Seventh Circuit has refused to approve the warrantless search of an "open" brown paper sack, the contents of which were not in the "plain view" of the officer before he seized the bag.[54] Other courts have reached similar results.[55] And, in *United States v. Dien*,[56] a unanimous panel of the Second Circuit disallowed the warrantless search of three large cardboard boxes; the court found the Supreme Court's decision in *Arkansas v. Sanders* controlling.[57]

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[53] 442 P.2d 665, 669 (1968).

[54] United States v. Griffith, 537 F.2d 900 (7th Cir. 1976).

[55] *See, e.g.*, North Carolina v. Francum (No. 7825 SC 773, C.A.N.C., January 16, 1979) (paper bag); State v. Brown, 557 P.2d 1052 (Sup. Ct. Arizona, 1976) (paper bag). *See also*, Liles v. State of Florida, 375 S. 2d 1094 (D.C. App. Fla. 1979) (vinyl satchel); People v. Boyles, 395 N.E. 2d 663 (Ill. App. Ct., 1979) (cloth drawstring bag).

[56] No. 79-1036 (2d Cir. Oct. 26, 1979).

[57] *Id.*, Slip Op. at 5245. The majority attempts to distinguish *Dien* on two grounds. Majority Opinion at 11 n.3. First, it asserts that the defendants in *Dien* manifested an expectation of privacy by secreting the boxes inside their van. But Ross had secreted his paper bag in his trunk. This leaves only the fact that the defendants in *Dien* had used plastic tape to seal the boxes to distinguish *Dien* from the case at hand. But this is not a rational ground for distinction. *See* Part III *supra* (discussing the significance of taping a paper bag). Additionally, it is quite possible that taping the boxes in *Dien* was necessary to accomplish the closing of the boxes. Ross had closed the bag by folding it over.

Finally, two recent cases in our own Circuit bear mention. In *United States* v. *Battle*,[58] the defendant challenged the warrantless search of a shopping bag he was carrying at the time of his arrest. The shopping bag was not searched until the defendant was at police headquarters. The court approved the search as incident to a lawful arrest because, under the rule of *Draper v. United States*,[59] a container which is within the immediate control of the defendant at the time of his arrest may be searched incident to his arrest even if the search is not contemporaneous with the arrest. Of course, no one contends that the *Draper* exception, which applies to all containers (suitcases as well as bags), governs the case before us. The paper bag was not in Ross' immediate control at the time of his arrest. To that extent, *Battle* is irrelevant. But, it is significant that the *Battle* court felt constrained to find an exception to the warrant requirement—the "search-incident-to-arrest" exception—sufficient to justify the search. By implication, therefore, the *Battle* court felt that the warrant requirement applied to the paper bag that was searched.

United States v. Brown [60] presented a situation where, as the arresting officers approached the defendant, he shoved or threw a small paper bag into a bush beside him. A search of the bag revealed narcotics. The defendant challenged the warrantless search as illegal. In discussing the merits of the defendant's claim, the majority and the dissent struggled with the question of whether the defendant had abandoned the paper bag—thus permitting a warrantless search. Neither the majority nor the dissent doubted that the Fourth Amendment extended to the paper bag.

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[58] 510 F.2d 776 (D.C.Cir. 1975) (Tamm, J.).

[59] 358 U.S. 307, 314 (1959).

[60] Nos. 77-2106 and 77-1646 (D.C. Cir. March 21, 1980).

CONCLUSION

The fatal flaw in the majority opinion is that, in examining the applicability of the Fourth Amendment to the search of the paper bag, it shifts the burden of demonstration from those seeking to justify the search to those seeking the protection of the warrant requirement. This unfortunately constitutionalizes a distinction between a red leather pouch and a paper bag that is necessarily based at least in some part on economic and class differences and perceptions.